UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 695 835 9

T
C7766mu
1913

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/municipalcorpora00cool

HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON

MUNICIPAL CORPORATIONS

By ROGER W. COOLEY, LL.M.

Professor of Law, University of North Dakota

Author of "Briefs on the Law of Insurance," "Law of Municipal Corporations" "Illustrative Cases on Persons and Domestic Relations," "Illustrative Cases on Damages," "Illustrative Cases on Insurance" and "Illustrative Cases on Sales"

A COMPANION BOOK

TO

COOLEY ON MUNICIPAL CORPORATIONS

St. Paul, Minn.

WEST PUBLISHING CO.

1913

Copyright, 1913
by
WEST PUBLISHING COMPANY

(Cooley Cases Mun.C.)

T
C7766mu
1913

RTF 19 Dec 53

THE HORNBOOK CASE SERIES

It is the purpose of the publishers to supply a set of Illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the classroom. The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. With instruction and study along these lines, the student should secure a fundamental knowledge and grasp of the subject. The cases on a particular subject are sufficiently numerous and varied to cover the main underlying principles and essentials. Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.

West Publishing Company.

729233

TABLE OF CONTENTS

CORPORATIONS—PUBLIC AND PRIVATE

Page

I. Public Corporations—Classification 1
II. Municipal Corporations—Distinguishing Elements 4

CREATION OF MUNICIPAL CORPORATIONS

I. Power to Create Municipal Corporations—Delegation of Power .. 12
II. Legislative Discretion 15
III. Legislative Power—How Exercised 16
1. Self-Chartered Cities 16
IV. Territory and Population 20
V. Assent to Incorporation 24
VI. Corporations by Implication or Prescription 25
VII. Validity of Incorporation—De Facto Corporations 30
VIII. Validity of Incorporation—How Tested 31
IX. Operation and Effect of Incorporation 33

LEGISLATIVE CONTROL

I. Legislative Control in General 36
II. Offices and Officers 45
III. Public Funds and Revenues 45
IV. Obligations Imposed by Legislature 49
V. Public Thoroughfares 57

ALTERATION AND DISSOLUTION

I. Territorial Increase or Decrease 61
1. In General 61
2. What Territory may be Annexed 67
II. Consolidation 71
III. Operation and Effect of Annexation, Division or Consolidation 74
IV. Repeal of Charter and Dissolution 89
V. Reincorporation 93

THE CHARTER

I. Municipal Powers—Inherent—Express—Implied 97
1. In General 97
2. General Welfare Clause 100
II. Exercise of Powers 108

PROCEEDINGS AND ORDINANCES

I. The Governing Body 114
1. De Facto Council 114
II. Mode of Action 116
III. Meetings 119
IV. Ordinances—Mode of Enactment 122

Page

V. Essentials of Valid Ordinance 129
1. Must Not be Oppressive 129
2. Must Not Contravene a Common Right 132
3. Must Not be Unreasonable 135

OFFICERS, AGENTS, AND EMPLOYÉS

I. Eligibility 146
II. Appointment and Election 149
III. Officers De Facto 154
IV. Salary 158
V. Removal 161
VI. Personal Liability—Contracts 164
VII. Personal Liability—Torts 166

CONTRACTS

I. Contracting Agencies 168
II. Mode of Contracting 170
III. Letting of Contracts 175
IV. Term and Duration of Contract—Power to Bind Successors 186
V. Ultra Vires Contracts 190
VI. Same—Ratification and Estoppel 196
VII. Implied Promise 199

IMPROVEMENTS

I. General and Local Improvements Distinguished 202
II. Power to Make or Aid 206
III. Preliminary Proceedings 207
IV. Special Assessments 216

POLICE POWERS AND REGULATIONS

I. Extent and Limitation of Power 231
II. Peace and Order 232
III. Sanitation 235
IV. Safety 239
V. Occupations and Amusements 247

STREETS, SEWERS, PARKS, AND PUBLIC BUILDINGS

I. Use of Streets 254
II. Abutting Owners 269

TORTS

I. Governmental and Municipal Duties Distinguished 275
II. Care of Streets 281
III. Obstructions 288
IV. Sidewalks 290
V. Drains and Sewers 296

DEBTS, FUNDS, EXPENSES AND ADMINISTRATION

I. Limitation of Indebtedness 299
II. Borrowing Money 303
III. Municipal Bonds—Power to Issue 309
IV. Rights of Creditors 319

TAXATION

Page
I. Source of Power 325
II. Public Purpose Only 332
III. Subjects of Taxation 338

ACTIONS

I. Mandamus 344
II. Quo Warranto 347
III. Certiorari 349
IV. Injunction 351

QUASI CORPORATIONS

I. Distinguishing Elements 355
II. Counties 355
III. Torts 357
IV. County Bonds 366

*

TABLE OF CASES

	Page
Adams v. Ducate	338
Addington v. Littleton	279
Allen v. La Fayette	303
Askew v. Hale County	355
Bell v. Kirkland	190
Berlin v. Gorham	15
Blyhl v. Waterville	290
Board of Com'rs of Hamilton County v. Mighels	4, 355, 356
Boutte v. Emmer	166
Broadfoot v. Fayetteville	93
Broderick v. St. Paul	170
Broking v. Van Valen	25
Brown v. Bon Homme County	372
Buckley v. Tacoma	207
Chippewa Bridge Co. v. Durand	175
City Council of Augusta v. Burum	264
City of Biddeford v. Yates	108
City of Chariton v. Simmons	232
City of Chicago v. Gunning System	129
City of Crawfordsville v. Braden	100
City of Denver v. Coulehan	61
City of Duluth v. Krupp	250
City of Fergus Falls v. Fergus Falls Hotel Co	196
City of Guthrie v. Territory	30, 52
City of La Porte v. Gamewell Fire-Alarm Tel. Co	299
City of New Orleans v. Clark	46, 52
City of Raleigh v. Peace	206, 218
City of St. Paul v. Chicago, M. & St. P. R. Co	259
City of Wabasha v. Southworth	293
Claiborne County v. Brooks	366
Commonwealth v. Crowninshield	242
Coombs v. MacDonald	231
Cunningham v. Seattle	280
Diamond v. Mankato	183
Dodge v. Memphis	317
Fry v. Albemarle County	363
Garrabad, In re	135
Gray v. Burr	214
Green v. Cape May	99
Gutzweller v. People	45
Hansen v. Hirsch	52, 57
International Trading Stamp Co. v. Memphis	351
Ivins v. Trenton	271
Jackson v. Greenville	281, 293
Jewell Belting Co. v. Bertha	168
Johnson v. San Diego	83
Jones v. Clinton	286
Kansas City v. Lemen	275
Knobloch v. Chicago, M. & St. P. R. Co	245
Laugel v. Bushnell	235
Lawrence v. Ingersoll	149
Lawrence v. Toothaker	164
McAllen v. Hamblin	97
Magneau v. Fremont	116, 119
Manning v. Devils Lake	332
Markey v. Queens County	357
Marquis v. Santa Ana	158
Merchants' Nat. Bank of St. Paul v. East Grand Forks	49
Merrill v. Monticello	309
Mills v. Williams	1, 355, 356
Mt. Pleasant v. Beckwith	74
Oliver v. Jersey City	154
Osborne v. Oakland	347, 354
Palmer v. Danville	202, 225
Payne v. South Springfield	203
People v. Armstrong	141
People v. Hurlbut	36, 45
People v. Wagner	247
Pepin v. Sage	89
Perkins v. Burlington	340

	Page
Raymond's Estate v. Rutherford	216
Roche v. Jones	114
Rumsey v. Sauk Centre	33
St. Paul Gaslight Co. v. Sandstone	31
Shapleigh v. San Angelo	319
Simon v. Northrup	52, 57
Smith v. Crutcher	24
State v. Cincinnati	71
State v. Denny	4
State v. Dering	135
State v. Des Moines	325
State v. Duluth	161
State v. Gilbert	20
State v. Johnson	239
State v. O'Connor	16
State v. Ray	132
State v. Simons	12
State v. Sullivan	146
Stevens v. Miller	344
Swindell v. State	122
Tate v. St. Paul	296
Taylor v. Waverly	341
Thunborg v. Pueblo	288
Tice v. Bay City	285
Town of Newport v. Batesville & B. R. Co.	106
Townsend v. Epstein	254
Vestal v. Little Rock	67
Village of Pillager v. Hewitt	199
Westminster Water Co. v. Westminster	186
Wilson, In re	116, 349
Zimmerman v. Metropolitan St. R. Co.	269

†

HORNBOOK CASES

ON

MUNICIPAL CORPORATIONS

CORPORATIONS—PUBLIC AND PRIVATE

I. Public Corporations—Classification [1]

MILLS v. WILLIAMS.

(Supreme Court of North Carolina, 1850. 33 N. C. 558.)

PEARSON, J. In 1816, the legislature established a county by the name of "Polk." In pursuance thereof justices of the peace were appointed, courts organized, and a sheriff and other county officers elected, who entered upon the discharge of the duties of their respective offices. In 1848 the act of 1846 was repealed, and the question is presented, has the legislature a right, under the constitution, to repeal an act, by which a county is established?

From the formation of our state government, the general assembly has, from time to time, changed the limits of counties, and has, over and over again, made two counties out of one, so that in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small; the power in both cases being derived from the fact that by the constitution "all legislative power is vested in the general assembly," which necessarily embraces the right to divide the state into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a dry question of law; and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporati .. is an artificial body, possessing such powers, and having

[1] For discussion of principles, see Cooley, Mun. Corp. §§ 4, 5.

such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body, than upon a private citizen.

The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a contract; and, therefore, cannot be modified, changed, or annulled without the consent of both parties.

So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.

The division of the state into counties is an instance of the former. There is no contract, no second party; but the sovereign, for the better government and management of the whole, chooses to make the division in the same way that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of counties and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no second party, having a direct interest.

A railroad is an instance of the latter. Certain individuals propose to advance capital, and make a road by which it is supposed, the public are to be benefited, in consideration that the legislature will incorporate them into a company with certain privileges. The bargain is struck; neither party has a right to modify, change, annul, or repeal the charter without the consent of the other; and (still to borrow an illustration from the farmer) he has in this case leased out his fields at a certain rent, and has no right to make one larger and another smaller, without the consent of his tenant.

Roads furnish another familiar illustration: The county court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the county authorities, and the overseer and hands have no direct interest or right to be heard in the matter,

except as other citizens. But if the legislature, instead of acting by its agent, the county authorities, choose to make a contract with certain individuals, that, if they will raise funds and make a road, they shall be incorporated with the right to exact tolls, etc., then the road cannot be altered or discontinued without the consent of the corporation.

When a county is established, it is done at the mere will of the legislature, because in its opinion the public good will be thereby promoted. There is no second party directly interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration, there cannot be a contract. The discharge of certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county: In legal parlance, the "consideration is past"—the thing is done, before their appointment. Some act for the honor of the station, others for the fees and perquisites of office; but their so doing did not form a consideration for the erection of the county, and is a mere incident to their relation as citizens of the county.

It was ingeniously argued that, upon the erection of a county, certain rights attach by force of the constitution, as the right to have at least one member in the house of commons; and as these rights are conferred by the constitution it is insisted that, having attached, it is not in the power of the legislature to take them away.

The argument is based upon a fallacy. It is true, the constitution invests every county with certain rights as incident to its existence as a county. But, by no sound reasoning, can the incident be made to override the principle; and the constitution, by conferring these incidental rights, cannot be by any fair inference made to interfere with the control of the legislature on the subject of counties, as instruments for the good government and management of the whole state.

The constitution preordains these rights, but they are put expressly as incidents to the existence of counties; and although they may very properly enter into the question of expediency, they have no legislative bearing upon the power to create and abolish counties as may to the wisdom of the legislature seem fit. Such statutes are not the result of contracts. There is no second party who pays a consideration, which is the essence of every contract. Terrett v. Taylor, 9 Cranch, 43, 3 L. Ed. 650; Dartmouth College v. Woodward, 4 Wheat. 663, 4 L. Ed. 629; Phillips v. Bury, 2 Term R. 346.

Judgment affirmed.

BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS.

(Supreme Court of Ohio, 1857. 7 Ohio St. 109.)

BRINKERHOFF, J.[2] * * * For the purpose of maintaining this action, an effort has been made in argument to assimilate counties to natural persons and municipal and other corporations proper. * * * And it is freely admitted that if counties are in all material respects like municipal corporations proper, and may be fairly classed with them, then this action ought to be maintained. But how is the fact? This question is vital, and on its solution the case must depend. As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them.

Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. Ward v. Hartford County, 12 Conn. 406; Boalt v. Commissioners, 18 Ohio, 16; Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 89. * * *

II. Municipal Corporations—Distinguishing Elements [3]

STATE ex rel. JAMESON v. DENNY.

(Supreme Court of Indiana, 1889. 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.)

Application for writ of mandamus. On March 19, 1889, there was filed in the office of the secretary of state what purports to be an act of the general assembly of the state of Indiana. The act pro-

[2] Part of the opinion is omitted.

[3] For discussion of principles, see Cooley, Mun. Corp. §§ 6, 7.

vides for the establishment, in all cities in this state containing a population of 50,000 inhabitants or more, of a board of public works and affairs, to consist of three members selected from the two leading political parties, one member of said board to hold his office for the period of two years from the date of his selection, and the other two members are to hold their offices for the period of four years. The members of such board must have been freeholders of the city at least one year prior to their election, and must have been bona fide residents of the city at least five years. Each member of such board is required to execute a bond in the sum of $20,000, to the approval of the mayor of the city, for the faithful performance of the duties of his office. The act abolishes all existing boards of public improvement and the office of street commissioner, and confers on the board of public works and affairs thereby created the power to perform all the duties heretofore conferred upon such board of public improvements and street commissioner. It also gives such board of public works and affairs full power to construct all streets, alleys, avenues, bridges, sewers, drains, ditches, culverts, sidewalks, and curbing, and to take charge of the cleaning, repairing, grading, and improving of the same; and to make all contracts for the furnishing of lights for the streets, public buildings, and public places in the city, and for furnishing water for the city for every purpose. It has the exclusive power to employ such superintendents, laborers, or other persons as it may deem necessary for the execution of its business, and fix their salaries and compensation. By the terms of said act the board of public works and affairs is to have the exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving all streets, alleys, avenues, lanes, bridges, drains, culverts, sidewalks, and curbing, and the lighting of such public places as may be deemed necessary in such city; to fix and establish the grades of all streets and alleys, avenues and thoroughfares. It may order and construct the improvement of any street, alley, or thoroughfare in the city, where a majority of the property owners affected thereby do not remonstrate. It has the exclusive power to make all improvements and expenditures. Such board is entitled to possession of all property belonging to the city used for the purposes named in the act, and it is made the duty of the common council to provide for the payment, out of the city treasury, of all the expenses incurred by the board of public works and affairs. It also makes it the duty of the general assembly of the state to elect the board of public works and affairs by a joint vote of a majority thereof. In case of a vacancy in such board, it is made the duty of the mayor of such city to fill the same by appointment.

Pursuant to the terms of this act, the relators were elected by the general assembly of the state of Indiana as members of the board of

public works and affairs for the city of Indianapolis, prepared the bonds therein required, and tendered the same to the mayor of said city for his approval. The mayor declined to approve said bonds, and this action was brought in the superior court of Marion county to compel him by mandate to discharge that duty. The rulings of said court being adverse to the relators, they appeal to this court, and assign error.

COFFEY, J.[4] * * * Admitting for the time being that the act in question is otherwise valid, it is insisted that, under our constitution, the general assembly had no power to elect or appoint the appellants, and that so much of the act as attempts to confer on it such power is in conflict with the constitution, and is therefore void. * * *

It is to be observed that the act takes away from cities having a population of 50,000 inhabitants or more all control over the streets and alleys, lights and water-supply, and transfers them to a board in the selection of which the people of the city have practically no voice. It is claimed that, inasmuch as it practically deprives the people of the power of local self-government, it is in conflict with our organic law, and is therefore void. In passing upon this question, it is necessary that we keep in mind the well-established rule by which we are to determine the constitutionality or the unconstitutionality of a statute. The power of the courts to declare a statute unconstitutional is a high one, and is very cautiously exercised, and is, in fact, never exercised in doubtful cases. Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698. An act of the legislature is not to be declared unconstitutional, unless it is clearly, palpably, and plainly in conflict with the constitution. Groesch v. State, 42 Ind. 547. Judge Cooley, in his able and valuable work on Constitutional Limitations (5th Ed. p. 208), says: "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power, and, if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done."

With these reasonable and well-established rules constantly in view, we proceed to examine the question of the constitutionality of the act now before us. In doing so, it must be obvious to every one that the constitution must be considered in the light of the local and state governments existing at the time of its adoption. Considered in any other light, many expressions found therein would be without meaning. That the principles of local self-government constitute

[4] The statement of facts is rewritten and parts of the opinions of Coffey, J., and Elliott, C. J., and all of the dissenting opinion of Mitchell, J., are omitted.

a prominent feature in both the federal and state governments is a fact not to be denied. It is recognized in Indiana in the constitution of 1816, and in the constitution of 1851. It is truthfully said by the learned judge who delivered the majority opinion in the superior court "that it existed before the creation of any of our constitutions, national and state, and all of them must be deemed to have been framed in reference to it, whether expressly recognized in them or not. Indeed, it is recognized as the chief bulwark for the protection of the liberties of the people against too great centralization of power, either in executive or legislative departments of the state."

It is perhaps true that the general assemply may at will pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had previously been given, but we do not think that it can take away from the people of a town or city rights which they possess as citizens of the state before their incorporation. The object of granting to the people of a city municipal powers is to give them additional rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. It may be true that as to such matters as the state has a peculiar interest in, different from that relating to other communities, it may by proper legislative action take control of such interests; but as to such matters as are purely local, and concern only the people of that community, they have the right to control them, subject only to the general laws of the state, which affect all the people of the state alike. The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone are concerned, and in which the state has no special interest, more than it has in the health and prosperity of the people generally, and they are matters over which the people affected thereby have the exclusive control, and it cannot, in our opinion, be taken away from them by the legislature.

Municipal corporations are to be regarded in a two-fold character—the one public, as regards the state at large, in so far as they are its agents for government; the other private, in so far as they are to provide for the local necessities and conveniences for their own citizens; and, as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it within the power of the legislature, to take them away, or to deprive the local community of the benefit of them. People v. Hurlbut, 24 Mich. 105, 9 Am. Rep. 103. In the case above cited, the learned judge who delivered the opinion said: "We must never forget, in studying its terms, [the constitution] that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an

accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages in the abstract, or municipalities which had lost all their old liberties by central usurpation, but American and Michigan municipalities, of common-law origin, and having no less than common-law franchises. So far as any indication can be found in the constitution of 1850 that they were to be changed in any substantial way, the change indicated is in the direction of increased freedom of local action, and a decrease in the power of the state to interfere with local management."

Again, in the same opinion, this language is used: "Incorporated cities and boroughs have always, both in England and America, been self-governing communities, within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than 'investing the people of the place with the local government thereof.' In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience or by encroachment. In modern times, cities have generally acted in ordinary matters by such a select body; * * * but, whether acting directly or by their representatives, the corporation is, in law, the community, and its acts are their acts and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation. This has been from time immemorial settled law. By articles 15 and 16 of the Great Charter, it was stipulated that the liberties and free customs of London, and all other cities, boroughs, towns, and ports, should be preserved. Those liberties were all connected with and dependent upon the right to choose their own officers, and regulate their own local concerns. * * * Our constitution cannot be understood or carried out at all except on the theory of local self-government, and the intention to preserve it is quite apparent. In every case where provision is made by the constitution itself for local officers, they are selected by local action. All counties, towns, and school-districts are made to depend upon it."

So the intention to preserve local self-government is apparent throughout the entire scope of our own constitution. By section 2, art. 6, county officers are to be elected by the people at the general elections. By section 3, art. 6, such other county and township officers as may be necessary are to be elected or appointed in such manner as may be prescribed by law; and it is expressly provided

that "all acts of incorporation for municipal purposes shall continue in force under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same." It is therefore perfectly apparent from the constitution itself that it was framed with reference to the then existing local governments of counties, towns, townships, and cities. Did the people, then, in the adoption of the constitution, surrender the right to local self-government which they at that time possessed? Judge Cooley, in the case above cited, said: "The state may mould local institutions according to its views of policy or expediency, but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs or no control at all."

Two years later, in a reconsideration of the same question (People v. Detroit, 28 Mich. 243, 15 Am. Rep. 202), he said: "Conceding, as we already have, the general right of the legislature to prescribe the duties and authority of municipal officers, it would nevertheless be easy to demonstrate that, unless there are some limitations upon that right, the constitutional guaranty of local self-government would be without meaning or value. Many things might be suggested so utterly destructive of the local municipal institutions which have been handed down to us that the most strenuous advocate of legislative authority would admit without hesitation that they were forbidden by the constitution. If we may suppose, for illustration, that the legislature shall provide that in Detroit a single person may be chosen, in whom may be vested the whole legislative authority of the city, and all other authority pertaining to local government, of every description and nature, not expressly by the constitution confided to officers specified, it would require unusual boldness in any one who should undertake to defend such a local dictatorship as something within the competency of legislation, under a constitution avowedly framed to guard, protect, and defend the local powers and local liberties."

In this case the legislature has undertaken to place in the hands of three men the exclusive control of all the streets, alleys, lanes, thoroughfares, bridges, and culverts in the city of Indianapolis, without the consent of those to be affected thereby, with full power to improve, alter, or change the same in any manner they may choose, with the exclusive power to employ all the assistance they may desire, including legal counsel, and fix their salaries and compensation in such sum as they, in their unrestrained judgment, may think proper, without any accountability to any one. Not only that,

but these three men are given absolute and exclusive control over the construction of all sewers, the water supply, and supply of lights, with no voice in the matter left to the people of the city. If the legislature may put these matters in the hands of three men, why not in the hands of one man? and, if they may transfer these matters, why may they not transfer others? In other words, the effort is by this act to take from the city all control over the improvements of the city, without the consent of her people, and place it in the hands of the agents of the state, chosen by the legislature, and charge the people of the city with the whole expense. We do not think that the people have conferred upon the legislature any such power. It is subversive of all local self-government,—a right that the people did not surrender when they adopted the constitution. They still retained, after the adoption of that instrument, the right to select their own local officers, and every effort to deprive them of such right must be held to be beyond the power of the legislature. In our opinion, the entire act attempting to create a board of public works and affairs for cities having a population of 50,000 or more is in conflict with the constitution, and is void.

In coming to this conclusion we have not been unmindful of the fact that authorities are to be found which would seem to lead to a different conclusion, but the authorities upon which we rely seem to be based upon the better reason. In support of the conclusion reached in this case, we cite: People v. Albertson, 55 N. Y. 50; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677.

We are asked to decide other questions in the case involving the validity of the act in question, but as we have reached the conclusion that it is void, as being in conflict with the constitution, we do not deem it necessary to extend this opinion. We find no error in the record for which the judgment of the superior court should be reversed. Judgment affirmed.

ELLIOTT, C. J. * * * Another element deserves consideration here, and that is this: The municipal corporation, as a local government, is not represented by the general assembly, and to permit that body to designate the officers who shall govern local affairs would be to tax the citizens of the corporation without representation. This, it is hardly necessary to say, would violate the principle which lies at the foundation of free government. It is no answer to say, as is sometimes said, that the municipal corporation has representatives in the general assembly; for a municipal corporation is not, as to its local affairs, represented by that body, for that body represents the state and legislates in state affairs. Incidentally, it legislates in a general way for localities, but only because the welfare of the whole state is thereby promoted. As a part of

the constituency of the legislature, the citizens of a town or city are represented, but they are represented in the capacity of citizens of the state, and not as the inhabitants of a municipal corporation. A town or city has but little power in any general assembly, and to permit that body to control their local affairs would put them in charge of men from distant parts of the state who could have little, if any, knowledge of local affairs, and no direct interest in them, so that the inhabitants of such a town or city would be governed by persons who did not, and who could not, in the just sense of the term, represent them; and this result our constitution will not tolerate.

I do not deny that the legislature has the power to change the form and mode in which municipal corporations shall be governed. On the contrary, I affirm that, without the consent of the inhabitants, the form of the corporate government may at any time be altered; but I do deny that the legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. By immediate local officers I mean such as are charged with the control of purely local concerns; as the streets, the fire apparatus, and the like matters. In the class of local officers, I do not include the peace-keeping officers, or the constabulary, for such officers are, in reality, officers of the state,—such as it is the duty of the state to provide for the personal safety of its citizens on the thronged streets of a great city, as well as on the secluded rural highways. What I affirm, in short, is this: That because an elector lives in a city he cannot have the right to vote upon purely local affairs taken from him by any statute. The decisions which declare that the state may appoint peace-officers in cities can be sustained only upon the ground that such officers are state officers, and not local officers. The principle is one not to be extended, but to be limited. * * *

CREATION OF MUNICIPAL CORPORATIONS

I. Power to Create Municipal Corporations—Delegation of Power [1]

STATE ex rel. LULY v. SIMONS.

(Supreme Court of Minnesota, 1884. 32 Minn. 540, 21 N. W. 750.)

MITCHELL, J.[2] This is an application for a writ of prohibition to restrain the respondent, a judge of the district court, from further action in proceedings now pending before him for the incorporation of certain territory as a village under the provisions of chapter 73, Gen. Laws 1883. The contention of the relator is that the act referred to is unconstitutional, because it assumes to delegate purely legislative powers to the district courts or the judges thereof.

Section 3 of this act provides that any district, sections, or parts of sections which have been duly surveyed and platted into lots and blocks, and lands adjacent thereto, which said plat has been duly and legally certified and filed, may become incorporated as a village in the following manner, upon application to the judge of the district court of the county in which such lands are situated. Section 4 provides that this application shall be by petition of at least 25 electors—residents upon the lands to be incorporated—setting forth the boundaries of such territory, the quantity of land embraced therein, the name of such village, and the resident population, as near as may be. Section 5 provides for the posting of copies of such petition, and of notices of the time and place when and where it will be presented to the court. Section 6 provides that at the time and place fixed in said notice, upon the filing of the petition and proof of posting as aforesaid, and the map or plat of said premises, the court may proceed to hear proofs for or against the corporation of said village, and upon such hearing may take such evidence as he shall deem necessary. Section 7 provides, if the court, after such hearing, shall be satisfied of the correctness of such survey and of the legality of such plat, and that all of the requirements of the statute have been complied with, that the lands embraced in such petition ought justly to be included in such village, that the interests of the inhabitants will be promoted thereby, it shall make an order declaring that such territory, the boundaries of which shall be therein set forth by metes and bounds, and which may be enlarged or diminished by such court from the boundaries specified in said applica-

[1] For discussion of principles, see Cooley on Municipal Corporations, §§ 8–10.

[2] Part of the opinion is omitted.

tion as justice may require, shall be an incorporated village by the name specified in said application, and in such order it shall designate three persons—electors residing on said territory—whose duty it shall be to give notice of an election in said incorporated village, as provided by section 10 of this act. Section 8 requires that such petition and order shall be filed in the office of the clerk of the court, and that he shall forthwith notify the persons designated in said order of the filing thereof, and that a certified copy thereof shall be filed in the office of the register of deeds, and be by him recorded, and thereupon said village shall be duly incorporated by the name designated in said order. Section 9 provides that any district which may be set apart by an order of the district court, and shall organize as such municipal corporation by the action of the inhabitants thereof in the manner and form hereafter provided, shall be endowed with all the powers incident to municipal corporations. Section 10 requires the three persons designated for that purpose in the order of the court, to give notice to the electors to meet to organize under the provisions of the act, and to elect officers for the ensuing year. It also provides for the manner of holding and conducting such elections.

It will be observed that under the provisions of this act the legislature has not, except as to certain preliminaries, determined or defined the facts or things upon the existence of which the territory shall be incorporated as a village. It will also be observed that the duty of the court is not simply to inquire and ascertain whether certain specified facts exist, or whether certain specified conditions have been complied with, but to proceed and determine whether the interests of the inhabitants will be promoted by the incorporation of the village, and, if so, what land ought in justice to be included within its limits. In short, it is left to the court to decide whether public interests will be subserved by creating a municipal corporation, and the determination of this question is left wholly to his views of expediency and public policy. That the determination of such question involves the exercise of purely and exclusively legislative power seems to us too clear to admit of argument. The granting of all charters of incorporation involves the exercise of legislative functions. The proposition (says Dillon) which lies at the foundation of the laws of corporations of the country is that they all, public or private, exist and can exist only by virtue of express legislative enactment creating or authorizing the creation of the corporate body.

All municipal corporations are mere auxiliaries to the state government in the business of municipal rule. The act of deciding when and under what circumstances the public interests require the creation of these auxiliaries or aids to the state government is one of the highest and most important legislative powers and duties. By section 1, art. 4, of the constitution of the state, the legislative department of the government is made to consist of a senate and house of representa-

tives. In them all legislative power is exclusively vested. One of the settled maxims of constitutional law is that legislative powers cannot be delegated. Where the constitution has located the law making power it must remain. The department to whose judgment and wisdom it has been intrusted cannot abdicate this power and relieve itself of the responsibility by choosing other agencies upon whom it shall be devolved. Cooley, Const. Law, 139.

As said by this court in State v. Young, 29 Minn. 551, 9 N. W. 737, it is a principle not questioned that, except when authorized by the constitution, as in respect to municipal corporations, the legislature cannot delegate legislative power. The power of local legislation commonly bestowed on municipal corporations does not trench upon the maxim, since this is authorized, impliedly at least, by the constitution itself; and the maxim itself is to be understood in the light of an immemorial practice which has always recognized the policy and propriety of vesting in such corporations these powers. As before remarked, municipal corporations are created for this purpose, as aid to the state government in the business of municipal rule. Cooley, Const. Law, 140. Had the legislature, by the act in question, fixed and specified all the conditions and facts upon which the incorporation of certain territory should depend, we do not question their right to refer to some tribunal or body the question of ascertaining and determining the existence of these facts and conditions. Neither do we decide that they might not delegate certain legislative powers regarding the organization and incorporation of villages to some appropriate municipal body which might constitutionally exercise local legislative powers. The delegation of certain powers of local legislation to municipal bodies, for reasons already suggested, is permissible. Boards of county commissioners are already, under certain limitations, invested with somewhat similar powers in the organization and change of boundaries of towns and school districts. But the present act assumes to delegate these legislative powers to the district court—a tribunal not authorized to exercise them, its jurisdiction under the constitution being purely judicial.

Cases may be found where it has been held that powers similar to those conferred by this act were properly delegated to certain so-called courts, but we think it will be found in almost every instance that these courts were not exclusively judicial, but also quasi municipal bodies invested with certain powers of local legislation. Such are the county courts in some states, which take the place of our boards of county commissioners in the municipal government of the county. * * * Let the writ issue.

II. Legislative Discretion [3]

BERLIN v. GORHAM.

(Supreme Court of New Hampshire, 1856. 34 N. H. 266.)

Assumpsit, to recover for supplies furnished for the support of Jeremiah Harding, and his wife, Nancy Harding, alleged to be paupers having their settlement in Gorham. The plaintiffs gave evidence that when Gorham was incorporated, on the 18th of June, 1836, Jeremiah Harding resided and had his home in the place which was incorporated into that town. The court ruled that if he so resided, he would thereby gain a settlement in Gorham, although no legal town meeting was holden, and though no town officers were chosen, before his removal. The defendant excepted to the foregoing ruling, and moved that the verdict returned for the plaintiffs be set aside.

BELL, J.[4] By the statute of 1828 (Laws Ed. 1830, p. 301), relating to the settlement of paupers, which is re-enacted without material change in the Revised Statutes, c. 65, § 1, cl. 6 (Comp. Stat. 157), "all persons, dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town, shall thereby gain a settlement therein." It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it; and as the pauper, though he resided in the town at the passage of the act, removed before any meeting was holden, he did not gain a settlement. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual, until it is accepted by the corporators, governs also the case of public corporations like towns. See A. & A. on Corporations, 68.

But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. People v. Wren, 4 Scam. (Ill.) 269; Warren v. Mayor,

[3] For discussion of principles, see Cooley, Mun. Corp. § 11.

[4] The statement of facts is rewritten and part of the opinion is omitted.

etc. of Charlestown, 2 Gray (Mass.) 104; Mills v. Williams, 33 N. C. 558; State v. Curran, 12 Ark. 321; Fire Department v. Kip, 10 Wend. (N. Y.) 267; People v. Morris, 13 Wend. (N. Y.) 337. * * * Judgment on the verdict.

III. Legislative Power—How Exercised [5]

1. Self-Chartered Cities

STATE ex rel. GETCHELL v. O'CONNOR.

(Supreme Court of Minnesota, 1900. 81 Minn. 79, 83 N. W. 498.)

Quo warranto by the state, on the relation of P. L. Getchell, against John J. O'Connor.

Brown, J. Quo warranto proceedings to determine the right of respondent to the office of chief of police of the city of St. Paul. The important question in the case is the constitutionality of chapter 351, Gen. Laws 1899, the same being an act to authorize cities and villages to frame their own charters. Pursuant to this act due proceedings were had by the city of St. Paul, and a charter framed and adopted as provided thereby, under the provisions of which respondent was appointed chief of police. Relator held the office at the time of the adoption of the new charter and the appointment of respondent, and disputes and contests the right of the latter to the office on the ground that the act of the legislature aforesaid is unconstitutional and void, in consequence of which the new charter is a nullity. We come directly to the main question, without further statement as to the rights of the respective parties to the office in question.

Chapter 351, Gen. Laws 1899, pursuant to which the new charter of St. Paul was framed, was passed and enacted under section 36 of article 4 of the constitution of the state, as amended in 1897. The relator assails the constitutionality of the act of the legislature on two grounds: (1) That it is unconstitutional and void because made to apply to cities in existence when the constitutional amendment was adopted, only; (2) that it is void because it fails to provide general limits within which to frame charters authorized thereby. The section of the constitution, so far as applicable to relator's first objection, reads as follows: "Sec. 36. Any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state, as follows: * * *" The act of the legislature, so far as here pertinent, reads: "Section 1. Any

[5] For discussion of principles, see Cooley, Mun. Corp. § 12.

city incorporated prior to the adoption of the constitutional amendment allowing cities already incorporated, and villages desiring to be incorporated as cities, to frame their own charter as cities, * * * and any village in the state of Minnesota desiring to be incorporated as a city, may frame a charter for its own government as a city as hereinafter provided."

It is the contention of relator that this act is void because limited and restricted to cities incorporated prior to the constitutional amendment, when, as he claims, the constitution applies to all cities, whenever incorporated. If this contention is sound, the charter must fall. It is sound if we read and construe section 36 of the constitution literally. Its language is that all cities may frame charters, while the act of the legislature provides that all cities incorporated prior to a given date may do so. Unless this limitation is warranted and justified by a proper construction of the constitution, the act must be declared void as special legislation. Respondent contends that the title to the act of the legislature proposing and submitting section 36 to the people as a constitutional amendment may be referred to in determining the intent of the legislature and of the people in adopting the amendment.

The title to the act proposing the amendment to the constitution reads as follows: "An act proposing an amendment to section 36 of article 4 of the constitution of the state of Minnesota, allowing cities already incorporated and villages desiring to be incorporated as cities, to frame their own charter as cities, and classifying cities for the purpose of general legislation." The body of the act, the section of the constitution as proposed to be amended, provides that any city or village may frame a charter for its own government, and the authority there confined is not confined or limited to those already incorporated. That the amended constitution was intended to apply to cities having an incorporated existence at the time of its adoption seems very clear to us.

In determining the intent of the amendment, reference may be had to the conditions surrounding the government of municipalities, and the history of general legislation with respect thereto. Holy Trinity Church v. U. S., 143 U. S. 459, 12 Sup. Ct. 511, 36 L. Ed. 226; U. S. v. Union Pac. R. Co., 91 U. S. 79, 23 L. Ed. 224; Croomes v. State, 40 Tex. Cr. R. 672, 51 S. W. 927, 53 S. W. 882. By a constitutional amendment in 1891, special legislation as to cities and villages was wholly prohibited. Thereafter all incorporated cities and villages were limited in the conduct and management of municipal affairs to the power and authority theretofore contained in and conferred by their charters, to which no amendments or additions could be made. The result of this was to hamper and embarrass such cities and villages in the conduct of their affairs. Exigencies and new conditions arose,

which demanded and required the exercise of greater power than was conferred upon them; but the legislature was powerless to act, except perhaps by general legislation, which was impracticable, because of the varied interests, duties, and responsibilities of different cities. The constitution prohibited granting any further privileges to such cities, and as a consequence the administration of public affairs thus became very much embarrassed and involved. To obviate all these difficulties, and to place such cities on a broader basis, and in a position prepared to meet and deal with new conditions sure to follow their advancement and growth, it was deemed wise and advisable to authorize them to frame and adopt their own charters. Cities in existence at this time were for the most part incorporated by special charters, and, by reason of the constitutional amendment of 1891, were absolutely helpless when confronted with new conditions requiring the exercise of additional power; and no doubt the legislature had this in mind, and intended the amendment of 1898 to relieve them, and to extend the same privilege to all villages, whether then or thereafter to be incorporated.

Under this construction there is little difficulty to be apprehended from the suggestion that cities may hereafter be created under the general laws of the state, and will be without remedy under this law, because not incorporated before its passage. As a rule, incorporated municipalities begin their existence as villages, and, as they grow in population and importance, changed conditions and new responsibilities require an advancement to the higher and greater powers incident to cities, and the village is changed and incorporated as a city. No city can be created by special charter, and it will be a very easy matter for the inhabitants of all villages or of any locality, desiring to become incorporated as cities, to proceed under the constitution and law here under consideration, and thus come into existence as cities under a homemade charter, and enjoy all the privileges conferred by the act. We cannot presume, for the purpose of defeating the act, that some locality may at some time in the future come into existence as a city under the general laws.

In view of all these considerations, and construing the amended constitution in this light, and in connection with the title appended thereto by the legislature, we have no hesitation in holding that the intention of the legislature and of the people in adopting and ratifying it was to limit the application of the amended constitution to incorporated cities then in existence. It is true that no title is required to a proposed constitutional amendment. Such an amendment may be proposed to the people by joint resolution of the legislature. Julius v. Callahan, 63 Minn. 154, 65 N. W. 267. But such title may be looked to nevertheless for the purpose of ascertaining the intent of the law. This is a universal rule, and applies where no title is required. Wilson v. Spaulding (C. C.) 19 Fed. 304; U. S. v. Carbery, 2 Cranch, C.

C. 358, Fed. Cas. No. 14,720; Clark v. Mayor, etc., 29 Md. 285; U. S. v. Palmor, 3 Wheat. 610, 4 L. Ed. 471; Page v. Young, 106 Mass. 313. It follows that the act in question is not in violation of the constitution, but in strict accord therewith.

Relator's second contention is that the act is void because no limits are prescribed within which to frame the charters thereby authorized. The section of the constitution in question provides that "before any city shall incorporate under this act the legislature shall prescribe by law the general limits within which such charters shall be framed." The contention is that the provision is mandatory, and requires the legislature to prescribe general and uniform limits or a broad framework on each topic to which the charter may relate, prescribing in detail the powers and authority within which the charter must be framed.

We cannot concur in this view. To adopt it would wholly nullify the purposes intended to be subserved and secured by the constitution. A "broad framework for each topic" pertaining to a city charter would in itself be a charter, and render the act of the city in framing one nothing more than adopting therefor the legislative grant of power, and, instead of exercising the right to "frame their own charter," they would be confined to what the legislature saw fit to grant them, and nothing more. The general power and authority to frame city charters is granted by the constitutional amendment, and ex necessitate extends to all powers properly belonging to the government of municipalities, and the requirement that the legislature shall prescribe limits within which such charter may be framed must be construed to mean limits beyond which the charter may not go. In other words, it is thus made the duty of the legislature to provide such general limitations and restrictions as that body may deem expedient and proper. No other interpretation can be placed on this provision, consistent with the plain and obvious purpose and intent of the legislature and people in adopting the constitutional amendment of which it is a part. In obedience to the requirements of the constitution, the legislature incorporated in the act in question certain specified limitations and restrictions upon certain subjects, and it is not for the court to say that other and further limits or restrictions should have been imposed. There was a sufficient compliance with the constitution in this respect.

It follows that the act is not open to the objections made against it, and is valid and constitutional. Other questions argued by counsel do not require further mention. There is no doubt as to the right of the respondent to the office in question. He was appointed thereto by the board of police commissioners created by the new charter, and has duly qualified. Section 6 of chapter 7 of the new charter provides that "all officers, employés, and members of the police force and department of said city of St. Paul, at the time when this charter becomes effective, shall continue to hold their several offices until re-

moved by said board; and all orders, rules and regulations applicable to said police force and department and in force at said time shall continue in force until otherwise provided by said board."

Relator contends that by the adoption of the new charter he became an officer thereunder, and could only be removed in the manner and for the reasons specified therein for the removal of officers. This contention is not sound. He was not an officer under the new charter, but was subject to the rules and regulations applicable to his office under the old charter, and under the provisions of the new charter above quoted, and section 16 of chapter 23, could be superseded by an appointment of another person by the police board, and has no right to insist that he could be removed for cause only. Writ quashed.

IV. Territory and Population [6]

STATE ex rel. YOUNG, Atty. Gen., v. VILLAGE OF GILBERT.

(Supreme Court of Minnesota, 1909. 107 Minn. 364, 120 N. W. 528.)

Quo warranto by the State, on the relation of E. T. Young, Attorney General, against the Village of Gilbert and others.

LEWIS, J.[7] This was a proceeding in quo warranto to test the validity of the incorporation of the village of Gilbert. * * * The territory includes 2,240 acres, located in the mining district of the Mesaba Range, St. Louis county. The entire tract, except as hereinafter stated, consists of wild, unimproved, cut-over lands, not specially suitable for agricultural purposes, and not inhabited. The platted portion consists of 80 acres, upon which 98 people resided. The Petit mine is located upon the S. W. 40 of section 24, and the N. W. 40 of section 25, in which locality 183 people resided. The Hobart mine is located upon the E. ½ of the N. W. ¼ of section 25, upon which 84 people resided. The La Belle mine consisted of the N. W. ¼ of the N. E. ¼ of section 24, upon which 68 people resided. There was another mine located upon the W. ½ of the S. E. ¼ of section 24, but the pleadings do not disclose the number of inhabitants residing in that vicinity. On the 40-acre tract in section 26, immediately south of and adjoining the platted portion, 288 people resided, and on the easterly portion of section 26 there resided 200 people. * * *

The alleged attempt to incorporate the village was begun in the spring of 1908, and according to the answer a schoolhouse is being

[6] For discussion of principles, see Cooley, Mun. Corp. § 13.

[7] Part of the opinion is omitted.

erected on the platted portion at a cost of $60,000, streets have been improved at an expense of about $4,500, and a lock-up built at a cost of $2,000. Streets have been laid out and graded, and sidewalks constructed. The village is a growing community, with stores and a telephone system; and an indebtedness of $6,000 has been incurred. It is stated in the answer that the territory in the northerly part of section 26 was not included as a part of the proposed village, for the reason that those residents were opposed to incorporation, and the voters residing thereon would have voted against the proposition. The answer also states that the reason why so large an extent of unimproved, wild, and cut-over lands are included is to better protect the village from forest fires and undesirable settlements in the vicinity; that the police protection, and the control of fires, peddlers, and school facilities for the whole community can be accomplished best with the nucleus on the platted portion as a center. Of those residing on the platted portion, who voted at the election to incorporate, 67 voted for incorporation and 27 voted against it.

The territory involved in this proceeding is not of so great extent as that involved in State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755, and State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613. In amount of territory the case more nearly conforms to the territory involved in State v. Village of Holloway, 90 Minn. 271, 96 N. W. 40, but resembles the two former cases in that the proposed territory embraces several settlements having no natural connection and located at considerable distances from the platted portion.

The settlements around the several mines consist of miners and their families, and, although no stores are maintained at the mines, it is apparent that the general purposes for which villages are incorporated have no common relation between these clusters of people. Large tracts of undeveloped, wild, and uninhabited land intervene and the territory, as a whole, does not constitute a village, within the definition so well expressed in State v. Minnetonka Village, supra: "A 'village' means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; and the object of the law was to give these aggregations of people in a comparatively small territory greater powers of self-government and of enacting police regulations than are given to rural communities under the township laws. The law evidently contemplates, as a fundamental condition to a village organization, a compact center or nucleus of population on platted lands; and, in view of the expressed purposes of the act, it is also clear that by the term 'lands adjacent thereto' is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never

designed that remote territory, having no natural connection with the village and no adaptability to village purposes, should be included." Here are several distinct mining settlements separated from each other, and from a half mile to a mile and a half from the village proper. It has not been made to appear how these separate communities can be brought together into one homogeneous people, and equitable and economically governed with respect to light, and police and fire protection, to say nothing of the benefits to be received by the distant settlements from the graded streets and sidewalks within the platted portion. As to these scattered communities, every element of "suburban character" and "unity of interest" is lacking.

But respondents insist that the statute, as amended, confers upon the county commissioners authority to determine whether the proposed unplatted territory adjoins the platted part and is "so conditioned as properly to be subject to village government," and that their decision is final. Prior to the amendment the statute read: "Any district, sections, or parts of sections, not in any incorporated village in the state of Minnesota, which has been platted into lots and blocks, also the lands adjacent thereto, when said plat has been duly and legally certified according to the laws of this state, and filed in the office of the register of deeds for the county in which said lands, or the larger portion thereof lie, said territory containing a resident population of not less than one hundred and seventy-five, may become incorporated as a village under this act in the following manner." Section 1200, Gen. St. 1894. The amendment (section 700, Rev. Laws 1905) reads: "Territory not already incorporated, which has been wholly or partly platted into lots, with a view to village occupancy, and which has a resident population of not more than three thousand nor less than two hundred, may be incorporated as a village in the manner hereinafter prescribed. But the unplatted part of such territory must adjoin the platted portion, and be so conditioned as properly to be subject to village government." The amendment adopts the construction by this court of the previous statute, and emphasizes the principle that outside unplatted territory cannot be included in a village unless it is so situated that it is naturally connected with and so situated as to be subject to village government.

As to the procedure, the following changes were made: Under the law in effect prior to the amendment, the statute (section 1201, Gen. St. 1894) provided that 30 or more of the electors then residents upon the lands to be incorporated might petition the county commissioners to appoint a time and place when and where the electors actually residing upon the lands should vote upon the question. The petition was to set forth the boundaries, the quantity of land therein embraced, and the number of persons actually residing in the territory, to be determined by a census to be taken under the direction of the petitioners; and section 1202 provided that the county com-

missioners, upon delivery to them of the petition, should post or cause to be posted in five of the most public places within the territory three copies of the petition, stating the time and place within the limits of the proposed village when and where the electors might vote for or against the incorporation, and the commissioners were required to appoint three inspectors to preside at the election. The law as amended (section 701) provides that 25 voters residing within the territory must sign the petition. Section 702 reads as follows: "If the county board approve said petition, it shall cause a copy thereof, with a notice attached fixing a time and place for holding such election, to be posted in three public places within the boundaries described. The time shall be not less than twenty nor more than thirty days after such posting, and the place within the limits of the proposed village. If there be a qualified newspaper published within said limits, there shall also be two weeks 'published notice of such election.'" Under the old statute the commissioners were not vested with any discretionary power. It was simply made their duty, when a petition in the proper form was presented to them, to cause the notice of election to be given and appoint inspectors for the election. They did not even have the power to go back of the petition and determine the genuineness of the signatures, as is prescribed in proceedings for the removal of county seats.

But it is claimed that the Legislature intended to make a radical departure, and that section 702 vests in the county commissioners discretionary power to pass upon the merits of the proposition and determine whether or not the territory set out in the petition adjoined the platted part, and was so conditioned as properly to be subject to village government. It is argued that, the commissioners in this case having considered the merits, having exercised their discretion, and determined that the outlying territory did adjoin the platted part and was so connected as to be subject to village government, their decision is final and not subject to review. This occasion does not call for any extended consideration of the powers which may be delegated to bodies such as boards of county commissioners. It is a vexed question, concerning which there is a wide divergence of judicial opinion. It is the settled law of this state, so far as the incorporation of municipalities is concerned, that the Legislature may designate such bodies as the instrumentality to submit to the voters the question of incorporation. But in our examination of this class of cases we have failed to discover any instance where such a body has been vested with judicial or quasi judicial powers sufficient to consider and finally determine the merits of the question. That the Legislature intended to introduce so radical a change is not warranted by the language of the amendment. The significant words relied upon by respondents are: "If the county board approves such petition." What is meant by the word "approves"? Does it refer to the deter-

mination of the reasonableness of the proposition to include the outlying territory, or does it merely mean that the commissioners shall determine from the face of the petition whether it contains the requisite number of residents and signers, and is in proper form? It is our opinion that the amendment imposes no new duties on the board of commissioners. It is simply another way of stating the same duty imposed by the former statute. Upon the admitted facts, the village was not incorporated in accordance with the law.

While the acting officers of the supposed village have gone on and incurred certain expenses for improvements, the relator has not been guilty of such delay in bringing this action as to call for the application of the principle of waiver or estoppel. There has been no express recognition of the village by the state, and the case is clearly distinguishable from St. Paul Gaslight Co. v. Village, 73 Minn. 225, 75 N. W. 1050, and State v. Village of Harris, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533. Let the writ of ouster be issued.

V. Assent to Incorporation [8]

SMITH v. CRUTCHER.

(Court of Appeals of Kentucky, 1892. 92 Ky. 586, 18 S. W. 521.)

Action by A. B. Smith against Z. H. Crutcher to restrain defendant from acting as police judge. From a judgment dismissing the action plaintiff appeals.

LEWIS, J.[9] At an election held May 3, 1890, in pursuance of the charter of the town of Pineville approved in 1878, and of an amendment thereto enacted in 1888, appellant, being a candidate for office of police judge of said town, received a majority of votes cast, and thereafter received a commission, and qualified as such. But April 16, 1890, an "act to incorporate the city of Pineville, in Bell county," was passed and approved, by which an election for office of police judge was provided to be held May 13, 1890, which was held, and appellee was elected to that office; and thereafter appellant instituted this action, and obtained an injunction restraining appellee from acting as such police judge in performance of the duties which he, having qualified, had commenced. But the injunction having upon final hearing been dissolved, and judgment rendered dismissing the action, this appeal is prosecuted. No evidence was heard or answer filed, and the single question is whether the facts stated in the petition, that are to

[8] For discussion of principles, see Cooley, Mun. Corp. § 14.

[9] Part of the opinion is omitted.

be taken as true, are sufficient to constitute any cause of action. There can be no question of the power of the legislature to pass the act incorporating the "city of Pineville," which was intended and had the effect to repeal the existing charter of the "town of Pineville," and to regulate municipal affairs, including the qualification and election of officers, without regard to the previous town charter. * * *

It does not make any difference whether there was or not, as alleged, a conspiracy on the part of speculators to induce the legislature to pass the act of April, 1890, nor was it necessary to the validity of that act for it to have been approved or ratified by appellant, the town of Pineville, or the trustees thereof, in the absence of a provision requiring it to be submitted to the people or trustees of the town for ratification or approval; for, as the statute appears to have been passed by the legislature, and approved, it must be treated as valid and effectual for all the purposes of its enactment.

It is, in a general way, alleged in the petition that an unlawful mob or conspiracy was formed between appellee, the city of Pineville, and a large number of persons, for the purpose of seizing control of municipal affairs of Pineville, without authority of law, and that the election of May 13th was held without previous notice. But if, as is admitted in appellant's petition, the election was held on the day fixed by the act of April, 1890, appellee was a citizen of Pineville, had the qualifications prescribed by the city charter, and was voted for by the legal voters of the city, he is entitled to the office, although the manner of holding the election may have been informal; and consequently the action was properly dismissed. Judgment affirmed.

VI. Corporations by Implication or Prescription [10]

STATE ex rel. BROKING v. VAN VALEN.

(Supreme Court of New Jersey, 1893. 56 N. J. Law, 85, 27 Atl. 1070.)

Original application in the name of the state at the relation of Henry Broking and others for mandamus to James M. Van Valen, law judge of the court of common pleas of Bergen county. Heard on rule to show cause.

LIPPINCOTT, J.[11] On the 20th day of February, 1893, a petition was presented to Hon. James M. Van Valen, the law judge of the court of common pleas of the county of Bergen, under an act entitled "An act for the formation and government of villages," approved

[10] For discussion of principles, see Cooley, Mun. Corp. § 15.

[11] Part of the opinion is omitted.

February 23, 1891, (P. L. 1891, p. 33,) and the act amendatory thereto, approved April 8, 1892, (P. L. 1892, p. 416,) to call an election to vote for or against the incorporation of the territory therein described as a village, to be known as the "Village of Carlstadt." All of the territorial area was within the township of Lodi. The petition was signed by Henry Broking and others, residents of the township of Lodi. One part of the territory sought to be incorporated, now known as "Carlstadt," was and is governed by a board of trustees; another portion was under the ordinary township government; and still another portion is known as the "Village of New Carlstadt," and is governed substantially the same as the first portion, by a board of trustees.

No objection was raised before the law judge, nor is there any objection here, to the form or sufficiency of the petition and the proceedings. The only question raised is whether the act of 1891 and the amendments of 1892 permit the incorporation of territory situated in parts, as this territory is, and governed as these parts are. The law judge held that the villages of Carlstadt and New Carlstadt were in the enjoyment of corporate powers, and that, therefore, the populations contained therein were not the persons denominated in section 1 of the act of 1891, and as to them the procedure provided by section 66 of the act must be followed; and, as that had not been done, he refused to order an election. This is now an application on rule to show cause why a mandamus to compel him to order such election should not issue out of this court.

The first section of the act of 1891 provides "that the inhabitants of any township or part of one or more townships in this state may become incorporated as a village under this act by complying therewith," etc. The act then proceeds to direct the manner of incorporation and organization, the manner of government, and provides for the corporate powers to be conferred upon such villages. This act of 1891 was under review in this court in Re Ridgefield Park, 54 N. J. Law, 288, 23 Atl. 674. In that case the act of 1891 was held in an essential provision to be invalid. The constitutionality of the provisions of the statute as contained in the fifth section of the act was questioned, and it was determined that the powers attempted to be conferred by that section upon the circuit judge to determine whether the proposed boundaries of the village were such as would be most advantageous and consistent with the public interests, and to confirm, amend, or alter the proposed boundaries as should seem to him most consistent with public or private interests, were powers properly belonging to the executive or legislative department, and not to be exercised by the circuit judge, who was a person belonging by force of the constitution to the judicial department; and that, therefore, this provision of the act was unconstitutional.

By the amendatory act of 1892, to which reference has been made, section 5 of the act of 1891 was repealed, and the attempt made to

eliminate the unconstitutional provisions of the act of 1891; and in the decision of the case here now before the court the act of 1891 as amended by the act of 1892 has been treated as furnishing a constitutional scheme for the incorporation of villages. * * * The sixty-sixth section of the act of 1891, as amended by the act of 1892, provides "that it shall be lawful for any village heretofore incorporated by virtue of any special or general law to adopt the provisions of this act and thereafter to be governed by the same in lieu of the act under which such village was originally incorporated. * * *

It has been conceded in the argument that, if either of the villages of Carlstadt or New Carlstadt have been heretofore incorporated by any general or special law of this state, then they, by virtue of this proceeding, cannot be included within the proposed incorporation, if upon them, or either of them, corporate powers for municipal purposes have been conferred; and mandamus will not lie to compel the law judge to call an election under the statutes to which reference has been made. * * *

There can be no question here, as matter of fact, that the area includes what is known as the "Village of Carlstadt" and what is known as the "Village of New Carlstadt"; the first village governed with limited powers by a board of trustees and a board of fire commissioners, the second village governed by a board of trustees. In 1860 (P. L. p. 234) an act was passed by the legislature entitled "An act to authorize the inhabitants of the village of Carlstadt in the county of Bergen to improve the sidewalks of the streets of said village." Previous to the passage of this act a large tract of land, including the entire village of Carlstadt, had been purchased by a corporation, organized and known by the name of the "German Democratic Land Association of Carlstadt," the tract was mapped out, and a map filed in the Bergen county clerk's office. This tract of land, in territorial area, now constitutes the village of Carlstadt. This map is referred to in the act of 1860. * * *

This statute remained without amendment until the year 1873, when a supplement was passed, (P. L. 1873, p. 770,) which conferred upon the landowners of the village the power to elect "nine suitable persons being landowners as aforesaid, who shall constitute and be styled 'The Carlstadt Board of Trustees,'" and provided for their terms of office; also for the election of one superintendent of streets and two street commissioners, and providing for the appointment of a clerk and collector by the board of trustees. The act creates the board of trustees to govern the village, with powers to grade, work, and repair the streets and roads laid out, to levy assessments for the same, etc., to borrow and to issue bonds; the right of suffrage for village purposes remaining in the landowners. By general law of 1890 (P. L. 1890, p. 241) the power of voting was extended to every citizen who was entitled to vote at any general election for members of the legislature.

In 1872 (P. L. 1872, p. 416) the Carlstadt fire department was organized, without however, giving any limit of territory or boundaries. The incorporators were made a body corporate under the name of the "Carlstadt Fire Department of Bergen County," with entire corporate capacity by that name. In 1872 (P. L. 1873, p. 734) the main inhabitants within certain boundaries including the village of Carlstadt were constituted a body corporate under the name and style of "The Carlstadt Fire Department of Bergen County." Certain appropriate powers were conferred by this act upon this corporation. These acts of the legislature clearly recognize a territorial area known as "Carlstadt," governed otherwise than by township government. * * *

The village of New Carlstadt was organized by virtue of an act entitled "An act to authorize the landowners of the village of New Carlstadt in the county of Bergen to make improvements," (P. L. 1873, p. 738.) Its provisions seem to confer upon the trustees selected under the act similar powers to those conferred upon the trustees of the village of Carlstadt. * * * If either one of these are incorporated villages, this proceeding for the incorporation of the proposed village fails. * * *

The contention of the relator here is that neither of these two villages are incorporated, but certainly the statutes relating to them create a board of trustees as a governing body, and confer corporate powers upon them. It is true, the powers are limited, but they are the corporate powers usually conferred upon municipalities of this grade. It is not necessary that all kinds of municipal powers should be conferred; neither is it necessary that the corporate powers bestowed be conferred by express legislative grant, in order to create a body politic and corporate. Such express words are in many instances wanting; but if, from the whole of the statutes, incorporation is inferred, it will be sufficient; and it does seem conclusive under the ordinary interpretation of the language of the statutes, that corporate powers were conferred. The power to issue bonds in the name of the village is a corporate power, and if they are not possessed of such corporate power the words of the statute giving the power to issue bonds are utterly meaningless.

The village of Carlstadt was incorporated within the meaning of section 66 of the act of 1891, in that there was an institution by these laws to regulate and administer the internal affairs to some extent of the inhabitants of that defined locality, in matters peculiar to the village, and not common to the people of the state at large. There was here an incorporated instrumentality to exercise powers, perform duties, and execute functions which were strictly municipal in their nature,—powers, duties, and functions to be exercised by local officers within well-defined territorial limits. Dillon, in his work on Municipal Corporations, (volume 1, § 42,) lays down a rule which it would appear is clearly applicable in the present case. He says: "Al-

though corporations in this country are created by statute, still the rule is here settled that not only private corporations aggregate, but municipal or public corporations may be established without any particular form of words or technical mode of expression, although such words are commonly employed. If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is to this extent created by implication. The question is upon the intent of the legislature, and this can be shown constructively as well as expressly."

Inhabitants of the Fourth School District v. Wood, 13 Mass. 193, was a case where the question was whether the plaintiffs were a corporate body, with power to sue. They were not incorporated expressly. But by statute the inhabitants of the several school districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school house, to determine its site, etc., the majority binding the minority. The opinion of the court was that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school house and to make to them a lease of land. The village of Carlstadt, upon a contract to pave sidewalks, could maintain an action; and so, too, could an action be maintained against them to levy the assessments in accordance with the statute, to pay the expense of such paving. The villages here were possessed of limited corporate powers of a very simple grade, but the powers conferred were no less corporate. Acts of the legislature have been frequently passed incorporating towns and villages within townships for special and limited purposes. In such cases the inhabitants of the district incorporated remained inhabitants of the township within which the town is situate for all purposes except those within the objects of the municipal government, and the jurisdiction of the township officers continues over them only so far as not inconsistent with the provisions of the incorporating act. State v. Troth, 34 N. J. Law, 387. The village incorporation is of the lowest grade, conferring the most limited powers. It ranks below the borough or the town, but within its range its incorporated powers are as amply protected as those of a city.

The conclusion in this case is reached that the villages of Carlstadt and New Carlstadt are incorporated villages within the interpretation of the sixty-sixth section of the act of 1891, as amended, and they cannot take advantage of the other provisions of that act, or be compelled to accept them, except in accordance with the provisions of that section. Therefore the mandamus is refused, with costs.

VII. Validity of Incorporation—De Facto Corporations [12]

CITY OF GUTHRIE v. TERRITORY ex rel. LOSEY.

(Supreme Court of Oklahoma, 1892. 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841.)

BURFORD, J.[13] On the 22d day of April, 1889, at the opening of the Oklahoma country to settlement and occupancy, a large number of people settled for town-site purposes upon the lands now occupied by the city of Guthrie. The act of congress approved March 2, 1889, contains a provision that no entry of lands for town-site purposes shall embrace more than 320 acres in any one entry. To avoid this inhibition, and segregate more lands for the purpose of trade and business, four separate entries were made of these lands, consisting of 320 acres each, and were severally denominated Guthrie, East Guthrie, Capitol Hill, and West Guthrie. The town-site settlers and occupants of each of these subdivisions organized what were called "provisional governments," under charters adopted by the people at public meetings held for such purpose, and each selected municipal officers, made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished, and imprisoned violators of such ordinances. These provisional governments assumed and exercised all the powers, functions, and authority of legally constituted municipal corporations, and continued to exercise the same until the month of August, A. D. 1890, when they were consolidated, and organized as a village corporation, under and pursuant to the laws of Nebraska, as adopted and extended over said territory by the act of congress approved May 2, 1890, providing a territorial government for the territory of Oklahoma. * * * The village of Guthrie continued her corporate existence until after the adjournment of the first territorial legislature, when she organized as a city of the first class, under the laws of Oklahoma. * * *

The first question to be determined in this controversy is as to the legal status or character of the so-called "provisional governments." It is a well-established rule of law that before there can be a de facto municipal corporation there must be some authority for a de jure corporation. A de facto corporation cannot exist where there is no law authorizing a de jure corporation. Norton v. Shelby County, 118 U. S. 426, 6 Sup. Ct. 1121, 30 L. Ed. 178; Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342. "The proposition which lies at the foundation of the law of corporations of this country is that

[12] For discussion of principles, see Cooley, Mun. Corp. §§ 16, 17.

[13] Part of the opinion is omitted.

here all corporations, public and private, exist, and can only exist, by virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is, with us, absolutely essential to lawful corporate existence." Dill. Mun. Corp. § 37. Was there any legislative sanction to the existence of municipal corporations prior to the act of congress approved May 2, 1890? We are unable to find any such authority. These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else; they were morally bound to make just recompense for that which they received in money, labor, or materials, but no such obligations could be enforced against them. The organic act furnished them a sovereign civil government, and supplied the authority for constituting de jure municipal corporations. Then they became and were de facto corporations until such time as they complied with the laws relating to incorporating villages, and became a de jure corporation. * * *

VIII. Validity of Incorporation—How Tested [14]

ST. PAUL GASLIGHT CO. v. VILLAGE OF SANDSTONE.

(Supreme Court of Minnesota, 1898. 73 Minn. 225, 75 N. W. 1050.)

START, C. J.[15] This action was brought to recover the amount of twelve interest coupons cut from six bonds of the village of Sandstone. * * * At the close of the evidence the trial court directed a verdict for the plaintiff for the amount claimed, and the defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The bonds in question are payable to bearer, and are issued under and by virtue of the provisions of Laws 1893, c. 200, for the purchase of a system of waterworks from the Sandstone Water Company. * * *

The defendant's first claim is that the bonds are not merely voidable, but absolutely void, for the reason that the village had no

[14] For discussion of principles, see Cooley, Mun. Corp. §§ 16–18.

[15] Part of the opinion is omitted.

power to issue them, and therefore they are void in the hands of the plaintiff, without reference to the question whether it is or is not a bona fide purchaser thereof. It is claimed that the village had no power to issue the bonds under any circumstances, because there is not, nor ever was, any village of Sandstone; that the statute (Laws 1885, c. 145) under which it attempted to organize as a municipal corporation is unconstitutional, for the reason that it delegates legislative functions to 30 private citizens; and, further, that it contravenes article 111 of the constitution of the state distributing the powers of government.

This statute, as construed in the case of State v. Village of Minnetonka, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755, is constitutional. The legislature by the statute fixed, determined, and specified all the conditions and facts upon which the incorporation of certain territory should depend, and the powers of the municipal corporation so to be organized. The point here made, that the statute is unconstitutional because legislative functions were delegated to the 30 petitioners who are authorized by the statute to take the initiative in the organization of the village by presenting a petition to the county commissioners was made in the case of State v. Village of Minnetonka, and was by necessary implication, if not directly, overruled; for it was held that discretion was not conferred upon the petitioners to arbitrarily determine how much and what territory should be included in the village. The legislature determined with practical certainty what territory might be incorporated as a village under the statute by limiting its operations to platted lands and other lands adjacent thereto, and so near the center of population thereon as to render them suburban in their character.

It is also claimed that the incorporation of the village was void because it included within the corporate limits territory not adjacent to the platted lands therein, within the meaning of the statute as construed by this court. Whether unauthorized territory was included in the village is wholly immaterial in this case. It is admitted that since 1889, when the village, in form, at least, was incorporated by a compliance with the statute as to all matters of procedure and form, it has, whether a de jure corporation or not, existed as a de facto municipal corporation, exercising in fact all the powers of such a corporation, and that it has been recognized as a village incorporated under the statute by the authorities of the town, city, and state in which its territory lies.

We have, then, a valid law under which the village might have been incorporated as a de jure municipal corporation, an attempt so to incorporate, and the continuous exercise of all of the powers of such a corporation for more than four years before issuing its bonds. The state has never questioned its existence as a de jure municipal corporation, but has recognized it as such. Such being the facts, the case is

within the rule that, where a municipal corporation is acting under color of law and exercising all the functions and powers of a corporation de jure, and the legality of its incorporation is not questioned by the state, but it has been recognized as such by the state for some years, neither the corporation nor any private party can question the validity of its corporate existence in a collateral action or proceeding. State v. Honerud, 66 Minn. 32, 68 N. W. 323; State v. Crow Wing Co., 66 Minn. 528, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745; 1 Dill. Mun. Corp. § 43a; Cooley, Const. Lim. (6th Ed.) 309, 310; 15 Am. & Eng. Enc. Law, 964. * * * Order affirmed.

IX. Operation and Effect of Incorporation [16]

RUMSEY v. TOWN OF SAUK CENTRE.

(Supreme Court of Minnesota, 1894. 59 Minn. 316, 61 N. W. 330.)

Action by Charles F. Rumsey against the town of Sauk Centre, and on motion of defendant the city of Sauk Centre was made a party defendant. From an order overruling a demurrer by the city to the complaint, it appeals.

MITCHELL, J. This action was originally brought against the town of Sauk Centre alone, but subsequently, on motion of the town, neither the plaintiff nor the city objecting, the city of Sauk Centre was made a party defendant, and plaintiff amended his complaint accordingly. The defendant city demurred to the complaint, on the ground that it did not state a cause of action. From an order overruling this demurrer the city appealed. Stated in chronological order, the allegations of the complaint are as follows: The town of Sauk Centre was a duly-organized township in the county of Stearns. The village of Sauk Centre, situated within the town, was organized as an incorporated village under Gen. Laws 1875, c. 139, and Sp. Laws 1876, c. 16, and so continued until the incorporation of the city of Sauk Centre, in 1889. In December, 1882, the town, in pursuance of the provisions of Sp. Laws 1879, c. 143, issued to the Little Falls & Dakota Railroad Company its bonds to the amount of $12,000, which were afterwards sold and transferred to the plaintiff, and upon which he brings this action.

In 1885 the legislature passed an act (Sp. Laws 1885, c. 296) entitled "An act to provide for the payment of the bonded indebtedness of the town of Sauk Centre incurred by said town by the issue of

[16] For discussion of principles, see Cooley, Mun. Corp. § 21.

its bonds prior to the year 1883 and to apportion said indebtedness between the present town of Sauk Centre and the village of Sauk Centre." The provisions of this act were that the bonded indebtedness of the town incurred by the issue of its bonds prior to 1883 should be apportioned and made chargeable to and payable by the town as then constituted, and by the village pro rata in the proportion that the valuation of taxable property of the town and village, respectively, shall bear to the entire valuation of the taxable property of the town and village collectively, said valuation to be determined by the general tax assessment list last preceding the time when the several installments of principal and interest upon such bonds become due and payable; and that the payment of such proportionate shares thereby apportioned should be provided for, and paid by, and be recoverable against, the town and village, respectively, as they become due, in the same manner as other debts of the town and village, respectively, were by law provided for, made payable and recoverable. In March, 1889, the city of Sauk Centre was incorporated by Sp. Laws 1889, c. 4. The city included the whole of the village, and 880 acres which were outside the village, but within the town. This act provided that upon the election and qualification of the city officers in April, 1889, the village corporation should cease, and thereupon the city should succeed to, and become vested with and the owner of, all the property and rights of action which belonged to the village, and should be and become liable for all the debts, obligations, and liabilities then existing against the village for any cause or consideration whatever, in the same manner and to the same extent as if originally contracted or incurred by the city.

1. The allegations of the complaint are full to the effect that the bonds were duly issued by the town by virtue of and in accordance with the provisions of Sp. Laws 1879, c. 143. Whether, in case these allegations are untrue, the recitals in the bonds are sufficient to estop the town or city from asserting the fact against a bona fide purchaser for value and before maturity, is a question not here involved, and hence need not be considered.

2. An examination of the acts under which the village was organized will show that, according to the repeated decisions of this court in similar cases, it remained a part of the town for all purposes, except the village purposes provided for in the acts. The property within the village was subject to taxation for the payment of these bonds in the same manner and to the same extent as any other property in the town. Bradish v. Lucken, 38 Minn. 186, 36 N. W. 454.

3. Inasmuch as this condition of things still continued, it is not apparent what was the particular necessity for the enactment of the law of 1885. But the meaning and effect of that act are quite clear. It did not and could not affect or change the rights of the holders

of the bonds against the town. But, as between themselves, it practically made the village and the remainder of the town two separate and distinct districts as respects liability for and the payment of all outstanding bonds of the village issued prior to 1883, and apportioned this indebtedness between the two in the ratio of the taxable property within their respective limits. Under this act, the village would be liable to the holders of the bonds to the extent of the amount apportioned to it; and, if the town (outside of the village limits) was compelled to pay more than its share, it could have recovered it back from the village. The power of the legislature to do this is undoubted. The village was a part of the town which issued the bonds. All the property within its limits was liable to taxation for their payment. The part apportioned to the village did not impose any materially greater burden of taxation upon the property within its limits than it was already subject to. The right of the legislature in all cases not within any constitutional inhibition to create, alter, divide, or abolish all municipal corporations, and to make such division and apportionment of the corporate property and debts of old corporations, in case of a division of their territory, as the legislature may deem equitable, is well settled. State v. City of Lake City, 25 Minn. 404; City of Winona v. School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687. And it can make no difference whether the legislature divides the old corporation only for a particular purpose or for all purposes. The intention of the act of 1885 to make the village, as a municipal corporation, liable for the designated proportion of the town bonds, is very clear; and, as we construe its provisions, there is no ground for the contention that the holders of the bonds could not recover against the village, but that it would only be liable over to the town. The fact that the city includes 880 acres more than the village neither alters the law of the case, nor involves any practical difficulty.

The liability of the village being established, the liability of the city, as its successor, under the act of 1889, is too clear to require argument. In case the plaintiff establishes his cause of action, he will be entitled to judgment against the town by virtue of its contract for the full amount of the bonds,—and against the city, by virtue of the acts of 1885 and 1889, to the extent of its proportionate share, as fixed by the act of 1885. There is nothing in the point that the act of 1885 violated section 27, art. 4, of the constitution of the state. Neither is there anything in the objection that it is a legislative exercise of judicial power. It does not assume to pass upon the validity of any outstanding bonds of the town. If there are any such which were not a valid indebtedness of the town, that defense is still available to both the town and the city. Order affirmed.

LEGISLATIVE CONTROL

I. Legislative Control in General [1]

PEOPLE ex rel. LE ROY v. HURLBUT.

(Supreme Court of Michigan, 1871. 24 Mich. 44, 9 Am. Rep. 103.)

Information in the nature of quo warranto, brought to test the right of the members of the boards of water commissioners and sewer commissioners of the city of Detroit to continue in office after the taking effect of an act establishing a board of public works. The questions raised relate to the validity of that act.

The act creates a board of public works for the city of Detroit and transfers to such board all the powers, duties, and responsibilities of the "board of water commissioners," the "board of sewer commissioners," and of the "commissioners of grades and plans." It vests in the board, for the purposes of the city, the property of the old boards, of which the water-works was the greater part; authorizes the board to take property by the right of eminent domain; to contract for the performance of the works entrusted to them, and employ workmen; to draw upon the proper funds, or, in certain cases, to issue bonds, for payment of expenses; and to make by-laws governing the public works in their charge.

The act appoints the first members of the board, specifies the terms of their offices respectively, and provides that vacancies, whether by expiration of term or otherwise, shall be filled by the common council of the city; and provides that no person shall be eligible for said board who is not a freeholder in said city, and a qualified elector.

COOLEY, J.[2] * * * We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property, and local conveniences, to make contracts for public works in behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim

[1] For discussion of principles, see Cooley, Mun. Corp. §§ 22, 23.

[2] The statement of facts is rewritten and part of the opinion of Cooley, J. and the opinions of Campbell, C. J., and Christiancy and Graves, JJ., are omitted.

of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial, for which, by the Constitution, other provision is expressly made. And the question broadly and nakedly stated, can be nothing short of this: whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure. I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now it must be conceded, that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice.

Our Constitution assumes the existence of counties and townships, and evidently contemplates that the state shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the state shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond these specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and

dependence to any extent, and for any period of time the state might choose.

The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest some time, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: First, that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.

De Tocqueville speaks of our system of local government as the American system, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible. Democracy in America, c. 5. Lieber makes the same comparison, and shows that a centralized govern-

ment, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. "Self-government," he says, "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality." Civil Liberty and Self-Government, c. 21. The writer first named, speaking of the New England township government, whose system we have followed in the main says: "In this part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the state. The townships of New England remained as they were before; and, although they are now subject to the state, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem, on the contrary, to have surrendered a portion of their independence to the state. The townships are only subordinate to the states in those interests, which I shall term social, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their local interests." Democracy in America, ubi supra. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the states have received delegations of power from independent towns; but the theory is, on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. Hutchinson's Massachusetts Bay, c. 1; Washburn's Jud. Hist. of Mass. c. 1; Body of Liberties, §§ 62, 66, 72; Elliott's New England, vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time. Trumbull's Hist. of Conn.

vol. 1, pp. 132, 498; Palfrey's New England, vol. 1, p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits and possibly with more regularity than before. In Rhode Island it is also true that township organization was first in order of time. Arnold's Hist. of R. I. c. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, "the American system of town governments, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the state, or colony, was crushed." Vol. 1, p. 487. So in Vermont the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers, and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization. Williams' Hist. of Vermont, vol. 2, p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and, in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded. See instances in Mulford's Hist. of N. J. pp. 143–144. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes, or rights of England. Bozman's Hist. of Maryland, p. 290. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, cannot be traced. Bozman, pp. 299–303. But it cannot be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island may be said generally of the eastern and middle states that the attempt of the last two Stuarts to overthrow their liberties was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, "men may not destroy their political any more than their natural lives." So it is recorded they clung to "the civil

liberties of New England" as "part of the inheritance of their fathers." Palfrey's New England, vol. 3, pp. 381–383; Bancroft's U. S. vol. 2, pp. 125–127; Mass. Hist. Col. XXI, 74–81. The whole contest with Andros, as well in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. "Everywhere," says Dunlap, "the people struggled for their rights and deserved to be free." Hist. of N. Y. vol. 1, p. 133; and see Trumbull's Hist. of Conn. vol. 1, c. 15.

I have confined this examination to the states which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the states further south, and this, with some of their leading statesmen, was a source of regret.

Mr. Jefferson, writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our Revolution, in its commencement, in the eastern states. * * * Could I once see this, I should consider it as the dawn of the salvation of the republic." Jefferson's Works, vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed, as compared to one freely assumed, that "it may be all one to the purse, but it worketh diversely upon the courage."

Such are the historical facts regarding local government in America. Our traditions, practice, and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the Revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it. Hammond's Pol. Hist. of N. Y. vol. 1, p. 197. Moreover, the first Constitution of New York was, in important particulars, exceptional. That state had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the Constitution was revised.

For those classes of officers whose duties are general—such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called—provision has to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the officers in question involve the custody, care, management, and control of the pavements, sewers, waterworks, and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent honest, upright, and prompt discharge of them, but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities as well as the soundest reason. The municipality, as an agent of government is one thing; the corporation, as an owner of property is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty. Terrett v. Taylor, 9 Cranch, 43, 3 L. Ed. 650; Town of Pawlet v. Clark, 9 Cranch, 292, 3 L. Ed. 735. And see Dartmouth College v. Woodward, 4 Wheat. 694–698, 4 L. Ed. 629.

When the state deals with a municipal corporation on the footing of contract, it is said by Trumbull, J., in Richland v. Lawrence, 12 Ill. 8, the municipality is to be regarded as a private company. In Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the state at large had no concern. In Warren v. Lyons, 22 Iowa, 351, it was held incompetent for the legislature to devote to other public uses land which had been dedicated for a public square. In State v. Haben, 22 Wis. 660, an act appropriating moneys collected for a primary school to the erection of a state normal school building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well-understood fact that these corporations are of a twofold character: the one public

as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the state must interpose. The state may change municipal boundaries; and then a division of the corporate property may be needful. The state may take away the corporate powers, and then the property must come to the state as trustee for the parties concerned. In either of these cases, undoubtedly, state action becomes essential; and the property may be disposed of according to the legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for state intervention arose.

In view of these historical facts, and of these general principles, the question recurs whether our state Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. * * *

Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a Constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the

body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * *

The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

What I say here is with the utmost respect and deference to the legislative department, even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be warded off. Nevertheless, when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.

But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the Constitution. That instrument provides (article 15, § 14) that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the Constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicated that these elections are to be by the local voters, and not

by the legislature, or by the people of a larger territory than that immediately concerned. * * *

So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained either on general principles or on the words of the Constitution. * * *

II. Offices and Officers [3]

PEOPLE ex rel LE ROY v. HURLBUT.

(Supreme Court of Michigan, 1871. 24 Mich. 44, 9 Am. Rep. 103.)

See ante, p. 36, for a report of the case.

III. Public Funds and Revenues [4]

GUTZWELLER v. PEOPLE.

(Supreme Court of Illinois, 1852. 14 Ill. 142.)

CATON, J. We cannot persuade ourselves into a doubt of the authority of the legislature to take from the city of Alton the power to grant licenses to sell spirituous liquors. That right was conferred by the city charter passed in 1837, and the receipts for such licenses contributed towards a fund for the support of paupers within the city. It is within the undoubted jurisdiction of the legislature to determine within what districts of country the inhabitants shall be associated together, for the purpose of supporting the paupers within the prescribed limits. Whether such district shall be a town, city, or county, or even the whole state, is for the lawmaking power to determine. It was as much the right of the legislature to say that the city should support her paupers, as that the county should support hers. So, too, it was for the legislature to determine who should issue licenses to sell strong liquors, and to specify whether the money thus raised should be devoted to the support of paupers, or the maintenance of the police, or to any other purpose. It gave the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the

[3] For discussion of principles, see Cooley, Mun. Corp. § 24.

[4] For discussion of principles, see Cooley, Mun. Corp. § 25.

general fund of the city. If the legislature could not take from the city authority the power to issue licenses it certainly had no right to deprive the counties of the same authority. Cities are as much the creatures of legislative will as are counties, and what may be done with the one they have authority to do with the other. Trustees v. Tatman, 13 Ill. 30, and notes.

Was it the intention of the legislature, by the law of 1851, to deprive the city of Alton of the right which she had hitherto enjoyed of granting these licenses? The language of the law is so explicit that it leaves but one possible answer to the question. After prohibiting the sale and prescribing the penalty for a violation, the act, in the sixth section, provides, that "all laws and parts of laws authorizing licenses to be granted to keep groceries, for the sale of vinous, spirituous, or mixed liquors, are hereby repealed, and the provisions of this act shall extend to all incorporated cities or towns in this state, anything in their charters to the contrary notwithstanding." From this it is too plain to be argued, that it was the intention of the legislature to withdraw all authority which had ever been conferred upon any subordinate governmental agencies to grant licenses for the sale of liquor; and that thenceforth the sale of ardent spirits in less quantities than one quart should be absolutely prohibited. By this law the power is as much taken from the city of Alton, as if she had been expressly named in the act. It was pro tanto a repeal of the city charter and was for that purpose as effectual as if the entire charter had been taken away; and if the legislature had the right to do the latter, they certainly had authority to do the former. The license set up as a defense in this case was issued without authority of the law, and can afford no protection to the defendant for the commission of the act which was in express violation of the law.

The judgment of the circuit court must be affirmed. Judgment affirmed.

CITY OF NEW ORLEANS v. CLARK.

(Supreme Court of United States, 1877. 95 U. S. 644, 24 L. Ed. 521.)

Mr. Justice FIELD.[5] This was an action upon several coupons for interest annexed to bonds issued by the late city of Carrollton, in Louisiana, to the Jefferson City Gas-Light Company, a corporation created under the laws of that state, for laying gas pipes through certain streets of the city, and introducing gas for the use of its citizens. The bonds were indorsed by the president of the company, with its guaranty, for the payment of their principal and interest. * * *

The bonds were issued pursuant to an ordinance of the city, which provided for the payment of the interest thereon, but made no provi-

[5] Part of the opinion is omitted.

sion for the payment of the principal; and for this omission, and because they were issued in aid of a private corporation, their validity was questioned by the city of New Orleans, upon which the liabilities of Carrollton were cast upon its annexation to that city; and as it was contended in answer to this position that the legislature had subsequently, in the act of annexation, legalized the issue, the power of the legislature to do this was denied, but the Circuit Court held that the legislature possessed the power; and the city of New Orleans was adjudged bound to pay the bonds.

The record shows that the bonds were issued after the work had been done for which the contract was made and the gas had been introduced into the city, and that they were transferred to the plaintiff for a valuable consideration. * * *

The invalidity of the bonds was asserted, as already stated, on two grounds: first, that they were issued in aid of a private corporation; and, second, that the city of Carrollton, in issuing them, created a debt, without providing in the same ordinance the means of paying its principal. The first of these grounds is not one which affects the validity of the bonds. A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and, though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way. The bonds here were not given to the company as a gratuity, but for a valuable consideration; and if the company failed to pay them at maturity, and their payment was made by the city, the gas-works were to become the property of the city.

The second of these grounds is not without force. An act of the legislature of Louisiana, passed in March, 1855, had declared that the constituted authorities of incorporated towns and cities in the state should not thereafter "have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract." This enactment imposed a restriction upon the creation of liabilities by municipal bodies, which could not be disregarded. It was intended to keep their expenditures within their means; and its efficacy in that respect would be entirely dissipated, if debts contracted in violation of it were held legally binding upon the municipalities.

Assuming, then, that the bonds were invalid for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are

full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city.

The act of 1874, which annexed Carrollton to New Orleans, provided that all property, rights, and interests of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, "including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-Light Company, and known as gas bonds," should be assumed and paid by the city of New Orleans; and that city was in terms declared liable therefor. Independently of this legislation, the liabilities of Carrollton would have devolved with its property upon New Orleans on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction. Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896. Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the act of annexation. The power of taxation which the legislature of a state possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the state it may exercise over the revenues of a city, for

any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied. A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent. People ex rel. Blanding v. Burr, 13 Cal. 343; Town of Guilford v. Supervisors of Chenango County, 18 Barb. (N. Y.) 615; s. c., 13 N. Y. 143.

The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.

Judgment affirmed.

IV. Obligations Imposed by Legislature [6]

MERCHANTS' NAT. BANK OF ST. PAUL v. CITY OF EAST GRAND FORKS.

(Supreme Court of Minnesota, 1905. 94 Minn. 246, 102 N. W. 703.)

Action by the Merchants' National Bank of St. Paul against the city of East Grand Forks. Judgment for plaintiff, and defendant appeals.

JAGGARD, J.[7] This was an action brought against the city of East Grand Forks to recover on certain warrants issued by that

[6] For discussion of principles, see Cooley, Mun. Corp. §§ 26, 27.

[7] Part of the opinion is omitted.

city, with interest. That city entered into a contract for paving certain streets with one Thornton. As the work progressed, estimates due and payable in the succeeding month were furnished by the city engineer, and were allowed by the city council. Upon them, six warrants on the city treasurer, aggregating $8,000, were issued to the contractor, and in course of time were duly presented for payment. Payment was refused for lack of funds. The treasurer indorsed the warrants as registered, and as drawing interest until presented for payment. These warrants were pledged to the plaintiff as collateral security for loans, and became its absolute property through foreclosure proceedings. The defenses interposed were (1) the illegality of the contract; and (2) the contractor's failure to perform. Upon the trial the court made rulings as to the evidence, and finally based its findings of fact and conclusions of law and order for judgment for the plaintiff, in the full amount claimed, upon the proposition that the contract was validated and the warrants legalized by section 9 of chapter 382, p. 695, of the Laws of 1903. * * *

2. The second contention of the defendant was that a vested cause of action is beyond legislative impairment, and that a vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, and which do not touch the substance of the contract, and are not based on equity and justice. Mr. Justice Matthews, in Pritchard v. Norton, 106 U. S. 132, 1 Sup. Ct. 102, 27 L. Ed. 104; and see Farnsworth Loan & Realty Co. v. Commonwealth T. I. & T. Co., 84 Minn. 62, 86 N. W. 877; 8 Cyc. 910, 911. "Because, in the nature of things, there can be no vested right to violate a moral duty or resist the performance of a moral obligation." Grinder v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694. The decision of this branch of the case is not, however, determined by limitations placed by the Constitution upon the power of the Legislature to affect private property. The question here is whether the state Legislature has the power to impose upon a municipal corporation the payment of certain disputed obligations. The result of the exercise of that discretion is upon taxation. Now, it is well settled that the power which the Legislature may "exercise over the revenues of the state it may exercise over the revenues of a city for any purpose connected with its present or past condition." Mr. Justice Field in New Orleans v. Clark, 95 U. S. 644–652, 24 L. Ed. 521. In following this case, Mr. Justice Peckham says in Guthrie Nat. Bank v. Guthrie, 173 U. S. 528–537, 19 Sup. Ct. 513, 43 L. Ed. 796: "In the exercise of this jurisdiction over municipal corporations by the state or by the territorial Legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the government, and is based upon

the power of the state, as sovereign, to itself recognize, or compel any of its political subdivisions to recognize, those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition." And in Utter v. Franklin, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. Ed. 498, there was sustained the action of Congress in validating bonds issued by a territory, declared void because not necessary to the administration of internal affairs (Lewis v. Pima County, 155 U. S. 54, 15 Sup. Ct. 22, 39 L. Ed. 67), in a suit brought before the passage of the curative act. This principle has been recognized and enforced in this state. State v. City of Lake City, 25 Minn. 404; Kunkle v. Town of Franklin, 13 Minn. 127 (Gil. 119), 97 Am. Dec. 226; and see Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Flynn v. Little Falls E. & W. Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; People v. Burr, 13 Cal. 343; Town v. Supervisors, 13 N. Y. 143; Grover v. Inhabitants of Pembroke, 11 Allen (Mass.) 88; Bartholomew v. Town of Harwinton, 33 Conn. 408; Booth v. Woodbury, 32 Conn. 118; Freeland v. Hastings, 10 Allen (Mass.) 570; Schofield v. Watkins, 22 Ill. 66; Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

The immediate question to be here decided is whether the Legislature has the power to cure the defects involved in these warrants, eliminate the defenses herein interposed, and require the city to discharge these particular obligations. That the contract was void for three reasons was contended by defendant and denied by plaintiff: (1) There was no money in the treasury to pay the warrants, and no provision made for securing it, as required by the law under which defendant was incorporated. This statute, however, expressly excepts cases otherwise therein provided for. Here the contract is to be paid by local assessment. Therefore it was argued that the vitiating provision does not apply. See Comstock v. Inc. Village of Nelsonville, 61 Ohio St. 288, 56 N. E. 15. (2) No bond was given to secure claims for work and material, as required by chapter 321, p. 535, Laws 1901. But no such claims appear unpaid, and an adequate bond was given the city, which protected fully. (3) The warrants created an indebtedness in excess of amount prescribed for the city. It was impliedly conceded that the curative law is valid so far as it affects all the objections of the defendant on these grounds. * * * Judgment affirmed.

CITY OF NEW ORLEANS v. CLARK.

(Supreme Court of United States, 1877. 95 U. S. 644, 24 L. Ed. 521.)

See ante, p. 46, for a report of the case.

SIMON v. NORTHRUP.

HANSEN v. HIRSCH.

(Supreme Court of Oregon, 1895. 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171.)

See post, p. 57, for a report of the case.

CITY OF GUTHRIE v. TERRITORY ex rel. LOSEY.

(Supreme Court of Oklahoma, 1892. 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841.)

BURFORD, J.[8] On the 22d day of April, 1889, at the opening of the Oklahoma country to settlement and occupancy, a large number of people settled for town-site purposes upon the lands now occupied by the city of Guthrie. The act of congress approved March 2, 1889, contains a provision that no entry of lands for town-site purposes shall embrace more than 320 acres in any one entry. To avoid this inhibition, and segregate more lands for the purpose of trade and business, four separate entries were made of these lands, consisting of 320 acres each, and were severally denominated Guthrie, East Guthrie, Capitol Hill, and West Guthrie. The town-site settlers and occupants of each of these subdivisions organized what were called "provisional governments," under charters adopted by the people at public meetings held for such purpose, and each selected municipal officers, made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished, and imprisoned violators of such ordinances. These provisional governments assumed and exercised all the powers, functions, and authority of legally-constituted municipal corporations, and continued to exercise the same until the month of August, A. D. 1890, when they were consolidated, and organized as a village corporation, under and pursuant to the laws of Nebraska, as adopted and extended over said territory by the act of congress approved May 2, 1890, providing a territorial government for the territory of Oklahoma; and said village of Guthrie succeeded to all the improvements, property, books, and documents of the several provisional governments. During the existence of the several provisional governments they each contracted and created in various ways pertaining to their munici-

[8] Part of the opinion is omitted.

pal affairs certain debts, which remained unpaid at the time the said provisional governments were converted into a legally-constituted municipal corporation.

The village of Guthrie continued her corporate existence until after the adjournment of the first territorial legislature, when she organized as a city of the first class, under the laws of Oklahoma, and has ever since remained such, with a mayor, common council, and police officers, exercising all the functions and powers of a municipal corporation, and is composed of the same people, and embraces the same territory, as the original provisional governments of Guthrie, East Guthrie, Capitol Hill, and West Guthrie, and has succeeded to all their property and improvements, and has adopted and appropriated the same. During the session of the first legislature, and after the village of Guthrie had been organized, an act was passed, entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the city of Guthrie." Chapter 14, art. 1, St. Okla. This act empowers the district judge of Logan county to appoint three disinterested persons to act as referees to inquire into and pass upon all claims and demands of every character heretofore issued by the four provisional governments for all purposes. * * *

Acting under the provisions of this statute, the district judge of Logan county appointed the relator, with two others, referees or commissioners, and they qualified and performed the duties required of them in said act, and made their report to the district court. Thereupon the court ordered that the relator be allowed the sum of $425 for his services as such referee, and ordered that the council issue warrants of the city of Guthrie therefor. This order was presented to the council in session, and a demand made for the warrant, which was refused. The relator applied to the district court of Logan county for an alternative writ of mandate, commanding the city to issue said warrant, or show cause why the same should not be done. * * * The court then rendered judgment for the relator, and issued a peremptory writ of mandamus commanding the defendant to issue said warrant. * * *

The first question to be determined in this controversy is as to the legal status or character of the so-called "provisional governments." It is a well-established rule of law that before there can be a de facto municipal corporation there must be some authority for a de jure corporation. A de facto corporation cannot exist where there is no law authorizing a de jure corporation. Norton v. Shelby Co., 118 U. S. 426, 6 Sup. Ct. 1121; Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342. "The proposition which lies at the foundation of the law of corporations of this country is that here all corporations, public and private, exist, and can only exist, by

virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is, with us, absolutely essential to lawful corporate existence." Dill. Mun. Corp. § 37. Was there any legislative sanction to the existence of municipal corporations prior to the act of congress approved May 2, 1890?

We are unable to find any such authority. These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else; they were morally bound to make just recompense for that which they received in money, labor, or materials, but no such obligations could be enforced against them. The organic act furnished them a sovereign civil government, and supplied the authority for constituting de jure municipal corporations. Then they became and were de facto corporations until such time as they complied with the laws relating to incorporating villages, and became a de jure corporation.

The de jure corporation having succeeded to all the property, public improvements, people, and territory of the provisional governments, has the legislature power to compel the de jure government to pay the debts of its illegal unauthorized predecessor? It is a fundamental rule that a legislature may, by a retroactive statute, cure or ratify any defect which it might have, in the first instance, authorized, unless prohibited by some constitutional or organic provision; or it may, by a retroactive statute, legalize any proceedings that it might have authorized. Wade, Retro. Laws, §§ 254, 257, and authorities cited. It can hardly be contended that the legislature could not have authorized the creation of the debts of the provisional government had there been a legislature prior to their organization; that is, it is not shown that the debts contracted, or any of them, are of a class that a de jure municipal corporation might not have been authorized to contract. Ratification is merely the act of conferring authority retrospectively; and this power must necessarily be measured by the constitutional provisions in force at the date of the curative act, where it is not denied by the constitution in force at the date of the original defective organization or act. Id. § 266. Retrospective laws may be enacted for the purpose of furnishing remedies for the enforcement of preexistent moral obligations which were not legally enforceable. Commissioners v. Bunker, 16 Kan. 498; Weister v. Hade, 52 Pa. 474; Wade, Retro. Laws, §§ 21–23.

Municipal corporations are but subdivisions of the state or territory created for the convenience and better government of its affairs by local officers. Their rights, powers, and duties are the creatures of legislative enactment, and they exist and act in subordination to the sovereign power that creates them. The legislature may determine what moneys they may raise and expend, and what taxation may be imposed, and it may compel a municipal corporation to pay a debt which has any moral or meritorious basis to rest on. Mayor, etc., v. Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618. * * * Judge Dillon, in his work on Municipal Corporations, (section 75,) thus states his conclusions: "The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation." In Guilford v. Supervisors, 13 N. Y. 143, the court states the rule thus: "The legislature is not confined in its appropriations of public moneys or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the states. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires, or will be promoted by it; and it is the judge of what is for the public good." * * * It was held in Brewster v. City of Syracuse, 19 N. Y. 116, that the legislature has power to authorize taxation for the payment of a claim not a legal obligation, and without the consent of the citizens of the municipality. "The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on a technical ground, would seem clear." New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521.

While the contracts and agreements entered into by the provisional governments cannot be enforced as contracts, either against the contracting parties or their successors, it does not necessarily follow that all the debts sought to be collected under this act are without remedy, and might not be enforced in some manner against the present city of Guthrie. If they can, then it presents a stronger reason for legislative action. In Nelson v. Mayor, etc., 63 N. Y. 544, the court said: "It has often been adjudged that if a city obtains money on a void bond, or for an illegal tax, or by mistake, and the money goes into the city treasury, the city can be compelled to refund. If it obtains property under a void contract, and actually uses the property, and collects the value of it from property owners by means of assessments, the plainest principles of

justice require that it should make compensation for the value of such property to the person from whom it was obtained. The city, in such case, however, should be held liable only for the actual value of the property, or what it obtained therefor, and would not be concluded by the contract price." This proposition is supported by the following cases: Herman v. City of Crete, 9 Neb. 356, 2 N. W. 722; Maher v. City of Chicago, 38 Ill. 266; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Chapman v. County of Douglass, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; Clark v. Saline Co., 9 Neb. 516, 4 N. W. 58.

There is no provision in the federal constitution or the organic act of this territory that contravenes the statute authorizing the village of Guthrie to pay these debts; and, aside from any question of implied liability for money had and received, or property appropriated and converted to the use of the city, it seems clear that the legislature did not exceed its authority in enacting said law. Courts cannot overthrow legislative acts upon the ground that they are vicious in their policy, or evil in their tendencies. Statutes must stand, unless found repugnant to some express provision of the organic law or constitution. Mount v. State, 90 Ind. 29, 46 Am. Rep. 192; County of Livingston v. Darlington, 101 U. S. 407, 25 L. Ed. 1015. The legislature is to be the judge of the policy or wisdom of the laws they enact, and, so long as they keep within the constitutional restriction, the courts cannot interfere, however unjust they may seem in their operations.

Counsel for the present city of Guthrie cites the case of State v. Tappan, 29 Wis. 664, 9 Am. Rep. 622, and insist that in that case the court lays down a rule contrary to the doctrine enunciated in the cases we have herein cited. A careful examination of that case fails to reveal any serious conflict. The decision is based upon local constitutional restrictions, and the general conclusion of the court is in harmony with the adjudicated cases. In summing up his conclusion the learned judge states this proposition: "The legislature may authorize a town to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received, or will receive, some direct advantage, or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order, and welfare of society, or where it is to be expended to pay claims founded in natural justice and equity, or in gratitude, for public services or expenditures, or to discharge the obligations of charity and humanity, from which no person or corporation is exempt." Under this rule the legislature might reasonably say to the village of Guthrie: "You have received some advantage from the work performed and improvements made by these provisional governments, and these claims are founded in natural justice, and we will authorize you to tax your property to pay them." The legislature

has seen fit to provide for the payment of these claims. It had the power to enact such a law. We find the statute in conflict with no superior rule or limitation which affects its vitality. * * *

Having reached the conclusion that the village of Guthrie was legally liable by legislative enactment for the proper provisional debts, is the city of Guthrie also liable, and can the defendant in the case at bar be required to pay the relator for his services? This question has been passed upon by several courts of the highest resort, and the same conclusion is reached in all. The city of Guthrie succeeded to all the rights, franchises, and property of the village of Guthrie, and is bound by all her contracts and obligations. The legislature made the village of Guthrie liable for these debts and claims. It constituted a part of her legal liabilities at the time the change was made from the village to the city organization. The new was bound to carry out and recognize all the legal contracts and liabilities of the old. A municipal corporation cannot escape the payment of just liabilities by a change of name, a change of organization, or a change of boundaries. The remedy may be for a time suspended or defeated, but the obligation rests the same, and the legal successor which takes the people, the territory, the property, and corporate benefits will be bound to meet the liabilities. Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; Girard v. Philadelphia, 7 Wall 1, 19 L. Ed. 53; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699; O'Connor v. Memphis, 6 Lea (Tenn.) 730. * * * Affirmed.

V. Public Thoroughfares [9]

SIMON v. NORTHRUP.

HANSEN v. HIRSCH.

(Supreme Court of Oregon, 1895. 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171.)

Actions by Joseph Simon against H. H. Northrup and others and John R. Hansen against Sol. Hirsch and others. From a judgment for defendants in each case, plaintiffs appeal. Modified and affirmed.

BEAN, C. J.[10] These two cases, which for convenience were heard together in this court, involve the constitutionality of an act of the legislature of 1895 providing for the acquisition by the city of Port-

[9] For discussion of principles, see Cooley, Mun. Corp. § 30.

[10] Part of the opinion is omitted.

land of the Morrison street bridge, Stark street ferry, and the upper deck of the steel bridge, and requiring the supervision, management, and control of said bridges and ferry, when so acquired, and of all the free bridges and ferries of the city acquired under the acts of 1891 and 1893, to be turned over to the Multnomah county court, to be thereafter supervised, managed, and controlled by said court. * * *

In the first place, the entire act is challenged upon the ground that it is incompetent for the legislature to compel the city of Portland to incur a debt for the construction of public bridges within its boundaries, and much was said at the argument about the inexpediency and injustice of such legislation, and the effect previous legislation of this character has already had upon the financial affairs of the city. But the question is one of power alone, and, however unjust, inexpedient, or even oppressive such legislation may be, the courts are powerless to declare it invalid if it is within the legitimate exercise of legislative powers. A municipal corporation is but the creature of the legislature, and in its governmental or public capacity is one of the instruments or agents of the state for governmental purposes, possessing certain prescribed political and municipal powers, to be exercised by it on behalf of the general public rather than for itself; and over it, as such agent, the authority of the legislature is supreme, and without limitation or restriction other than such as may be found in the constitution.

There is a line of authorities which hold, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from state, purposes. Park Com'rs v. Detroit Common Council, 28 Mich. 228, 15 Am. Rep. 202; People v. Mayor, etc., of Chicago, 51 Ill. 17, 2 Am. Rep. 278; People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480. But it seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor. That the making and establishment of public highways and bridges, and the assessment and collection of taxes, are within the legitimate legislative powers, and are among the ordinary subjects of legislation, cannot be questioned. Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired, belong to the city of Portland in its public or governmental capacity, and that in the acquisition of them it is but discharging a public or state duty which it is entirely proper for the legislature to impose upon it; and therefore, if there is no limitation in the constitution, it is no objection to the validity of an act for that purpose that a debt or liability against the corporation is to be created without its consent. Cooley, Tax'n, 682; Dill.

Mun. Corp. § 74; Winters v. George, 21 Or. 251, 27 Pac. 1041; State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; City of Philadelphia v. Field, 58 Pa. 320; Bank v. Katz, 57 Md. 145; Davis v. Railroad Co., 47 N. Y. 400.

That the construction of bridges and highways in a city, and the incurring of a debt therefor, should ordinarily be left to the judgment and discretion of the proper municipal authorities is manifestly just and in harmony with the right of local self-government and the theory of our political institutions, but the policy of such legislation is not for the courts. When the power is conceded, the courts cannot inquire into the expediency or manner of its exercise, or the motives or reasons prompting the particular act. We conclude, therefore, that the act in question is not invalid because it compels the city of Portland to incur a debt, without its consent, for the acquisition of public bridges and ferries. * * *

It is also contended that the legislature cannot take from the city of Portland the supervision, management, and control of the public bridges and ferries belonging to it, and transfer them to the county of Multnomah. In the first place, these bridges and ferries are not now, and never have been, under the supervision of the city of Portland, but are managed and controlled by a committee or commission appointed for that purpose by the legislature, and this act only purports to transfer their management and control from such committee to another state or governmental agent. But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. 2 Dill. Mun. Corp. 656, and authorities there cited; Cooley, Const. Lim. (5th Ed.) 335, and note. In accordance with this principle, it was held in Railroad Co. v. Portland, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299, that an act of the legislature granting the use of the public levee of the city of Portland to a railway company for railway purposes was a valid exercise of legislative powers. So, also, it was held in People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135, that it was competent for the legislature to transfer the control of the streets of a city to park commissioners, to be by them controlled for boulevard and driveway purposes.

A city occupies, as it were, a dual relation to the state,—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the constitution, and such property and ease-

ments as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature. But, on the other hand, such property as it may hold or acquire in its proprietary or private capacity is as much protected by the constitution as the property of the private citizen, and of which it cannot be deprived except for public purposes, and only then upon just compensation. To the latter effect are the authorities cited and relied upon by the defendant, and they are therefore not in point in this discussion. * * *

ALTERATION AND DISSOLUTION

I. Territorial Increase or Decrease [1]

1. In General

CITY OF DENVER v. COULEHAN.

(Supreme Court of Colorado, 1894. 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751.)

Action by Jeremiah Coulehan, suing for himself and others, against the city of Denver and others, to enjoin the assessment, levy, and collection of taxes upon certain property in Jefferson county by or for the use of the city of Denver. Trial, and judgment in favor of plaintiff, granting the perpetual injunction as prayed for. Defendants appeal.[2]

Elliott, J. The city of Denver was organized and existing under and by virtue of a special charter long before and at the time of the adoption of our state constitution. The constitution did not abrogate such charters, nor does it exempt them from legislative amendments. Const. art. 14, § 14; Id. art. 15, § 2; Brown v. City of Denver, 7 Colo. 305, 3 Pac. 455; Carpenter v. People, 8 Colo. 116, 5 Pac. 828. On April 3, 1893, the general assembly of Colorado passed "An act to revise and amend the charter of the city of Denver." See Sess. Laws 1893, p. 131. Prior to the passage of that act, the territorial limits of the city were wholly within the county of Arapahoe. Jefferson county bounds Arapahoe on the west, but between Jefferson and the western limits of the city of Denver there were at the time of the passage of the act above mentioned several municipal corporations, viz. the town of North Denver, the town of Highlands, the town of Colfax, and the town of Barnum. The territorial boundaries of these municipalities for the most part extended to the Jefferson county line, and so separated the city of Denver from that county. In fact, at the time of the passage of the act to revise and amend the Denver charter, no part of the territorial limits of the city of Denver was contiguous to any part of Jefferson county. Nevertheless, by the terms of said act, it was attempted to enlarge or extend the limits of the city of Denver by adding thereto a strip of land, 5½ miles long by 1½ miles wide, lying along the eastern border and wholly within the county of Jefferson.

If the act adding the Jefferson county strip to the city of Denver be upheld as valid, there might, perhaps, be no escape from the taxa-

[1] For discussion of principles, see Cooley, Mun. Corp. § 32.

[2] The statement of facts is rewritten.

tion complained of in the present action. The decisions exempting certain property within the territorial limits of a town or city from municipal taxation, on the ground that the property is so situated that it cannot receive its due proportion of municipal benefits, are strongly combated, on the ground that the doctrine they assert is illogical as well as impracticable, in that it amounts to a substitution of judicial opinion for legislative judgment in matters peculiarly within the province of the law making power. See, upon this subject, Cooley, Const. Lim. (6th Ed.) p. 616, note 3, and cases there cited; also, 2 Dill. Mun. Corp. (4th Ed.) §§ 794, 795, and notes. But it is unnecessary to decide this point.

In determining the present controversy, we shall endeavor to reach a proper solution of the following question: Has the legislature the power to extend or enlarge the territorial limits of a specially chartered town or city by adding thereto noncontiguous lands,—that is, lands entirely separated from such town or city by intervening territory? It is customary to speak of the power of the legislature over municipal corporations as "plenary." But this, like most attempts at epigrammatic statements of the law, must be taken cum grano salis. Certain it is that constitutional limitations must always be observed in respect to such legislation. Besides, insurmountable obstacles may arise out of the nature and subject-matter of the legislation to render the same ineffectual. In general, the boundaries of a specially chartered town or city may, by act of the legislature, be extended and enlarged so as to include additional lands, the property thus added becoming subject to municipal taxation, and entitled to municipal benefits.

It is urged that power thus vested in the legislature is subject to abuse or improvident use. This may be true, and yet it does not necessarily follow that the courts can restrain the enforcement of a legislative act merely because the legislature acted improvidently in passing it. Before the courts will restrain the enforcement of a legislative act, it must appear beyond reasonable doubt that the legislature in passing the act exceeded its power, or attempted to exercise a power it did not possess. Wadsworth v. Railway Co., 18 Colo. 612, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309. The improvident use of power by the legislative department of the government does not justify usurpation by the judicial department. The remedy for the improvident use of official power is by appeal to the people, whose will, when legally expressed under the constitution, is sovereign over all departments. It is true that all remedies for maladministration in civil government may fail, because all governmental agencies must be intrusted to minds subject to human infirmities. In such case we can only suffer and wait while we strive for improvement. Martin v. Dix, 52 Miss. 53; Turner v. Althaus, 6 Neb. 54.

Is there, then, in the present case no check that can curb the vaulting ambition of a great city in its efforts to enlarge its corporate

boundaries and increase its corporate revenues? Has the legislature such transcendent power in respect to territorial additions to specially chartered towns and cities that the courts can give no relief? Is there nothing left but an appeal to the people as the dernier resort? The answer to these questions must depend upon the nature and scope, as well as the subject-matter, of the legislative act in question. As we have seen, the general rule is that the legislature has the power to extend the boundaries, and thus enlarge the territorial limits, of a town or city existing under special charter. But may the legislative arm be extended as a great pothook into any and all the counties of the state, there to encircle, as in this case, many square miles of the territory of such outside counties, and make the same part and parcel of the city of Denver? May the legislature do this, without annexing any intervening territory, and without providing even a street or an alley to connect such outlying municipal additions to the city proper? It may be said that this is an extreme illustration; but, as was once said by Chief Justice Shaw, "It is necessary to put extreme cases to test a principle."

What is a city? With much research into the historical derivation of the word, Webster, pre-eminently the lexicographer of the law as well as of the common people, defines a "city" in substance as follows: (1) A large town; (2) a corporate town; in the United States, a town or collective body of inhabitants, incorporated and governed by a mayor and aldermen; (3) the collective body of citizens or inhabitants of a city. Since a city is a large town, we look for the meaning of the word "town." Again, we find from Webster that the primitive idea of a town was an inclosure. The popular use and meaning of the word is a large, closely populated place, whether incorporated or not, as distinguished from the country or from rural communities. These definitions are sustained and amplified by the Century Dictionary. The legal as well as the popular idea of a town or city in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants,—that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places; hence, locality, not localities; vicinity; vicinage; near, adjacent, not remote. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.

Legislative acts in the matter of extending the boundaries of municipal corporations are to be interpreted and applied according to the essential nature as well as the subject-matter of such legislation. In the nature of things, there must be some limit to legislative power. For example, the legislature cannot extend the municipal boundaries of a city into another state. Legislative acts upon such a subject would have no extraterritorial force. There are some things that in

their very nature cannot be accomplished by any human power: A thing cannot be made to exist as a whole and in broken disjointed fragments at one and the same time. A thing essentially single in its nature cannot have a plural existence. Every municipality must have its territorial corpus, in which to exercise its corporate functions and powers. Such corpus may be enlarged or diminished by the action of the legislature. So the human body may grow or diminish by the action or nonaction of its vital forces; but neither the human body nor the municipal corpus loses its identity, its individuality, or its unity by such growth or enlargement. It is a misnomer—a solecism —to speak of a growth of the human body not connected with the body itself. Such a growth is, in fact, not of the body. So, territory not in fact connected with or adjacent to a city cannot be regarded as a part of the municipal corpus, or as an addition thereto, in any true sense of the term.

Analogous questions have been considered by the Wisconsin supreme court. Railway Co. v. Town of Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840; Smith v. Sherry, 50 Wis. 210, 6 N. W. 561. In the latter case Mr. Justice Taylor said: "We do not by this decision intend to set bounds to the discretion of the legislature in fixing the boundaries of a village, so long as the territory of which it is composed is adjacent or contiguous, nor to intimate that the legislature may not incorporate as one village two or more assemblages of inhabitants living at some distance from each other, with spaces of uninhabited lands intervening, when such intervening spaces are also included in such village, but that a village cannot be incorporated containing two or more tracts of territory not contiguous or adjoining, and separated by some other civil subdivision of the state, and especially that an uninhabited and separate tract of country cannot be annexed to or made a part of an incorporated village. If, by an act of the legislature, a tract of country not inhabited, and not adjoining a village, can be made a part of such village, then it would seem to follow that, by another act of the legislature, the inhabited part of such village might be separated therefrom; and we should have the anomalous thing of a village without inhabitants, and composed simply of a tract of territory, which would be an absurdity."

From careful investigation and consideration, it is evident that it was never contemplated by the law that the territorial limits of a town or city might include distinct, disjointed fragments or parcels of land, situate miles and miles distant from each other, and separated from the city proper by intervening territory. It is not to be understood from this that a city may not be formed from territory lying on different sides of a natural stream. Nor must anything in this opinion be construed as intimating that noncontiguous territory may be added to a city by connecting the same by a narrow street or alley. Annexation sought to be accomplished by such means might bear upon its face such earmarks of fraud as would vitiate an ordinary trans-

action, though we do not intimate that judicial inquiry may extend to the motives of a co-ordinate department of the government. Kountze v. City of Omaha, 5 Dill. 443, Fed. Cas. No. 7,928; Kelly v. City of Pittsburgh, 85 Pa. 170, 27 Am. Rep. 633; People v. Martin, 19 Colo. 565, 36 Pac. 543, 24 L. R. A. 201; Hudson v. City of Denver, 12 Colo. 157, 20 Pac. 329. In City of Galesburg v. Hawkinson, 75 Ill. 158, it is said that the boundaries of municipal corporations can be altered and changed by the legislature in its discretion, and that the authorities are all that way. The opinion, however, significantly adds: "Courts may determine what are the corporate limits already established; they may determine whether what is claimed by the municipal authority to be the corporate limits is so or not; and they may inquire whether the legislative authority has exceeded the powers with which it is invested. But all this implies an existing law, applicable to the particular subject, and the inquiry is, what is the law, and has it been violated or complied with?"

Counsel for appellant relies upon the following from an eminent text writer: "Not only may the legislature originally fix the limits of the corporation, but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of contiguous *or other* territory; and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory." 1 Dill. Mun. Corp. (4th Ed.) § 185. The words "or other," in the foregoing extract, are not italicised in the published volume. The leading case cited in support of the text is Blanchard v. Bissell, 11 Ohio St. 96. That case was one wherein it was sought to annex an unincorporated village to the city of Toledo. It was objected that the territory sought to be annexed was not in fact contiguous to the city of Toledo. The opinion shows "that the center of the Maumee river formed the southeastern boundary of the city of Toledo; that the annexed territory [consisting of an unincorporated village called "Yondota"] is situated on the southeastern side of the river, in a bend running up near to the heart of the city, and that all of it is nearer to the center of the business and valuable property than many other portions of the original city territory; that the river is navigable, and, where it formed said original boundary, is of unequal width; but, for half a mile or more, does not exceed one-fourth of a mile in width, and has been permanently bridged for railroad purposes, and may be bridged for other purposes; that Yondota depended mainly upon the influence of business and improvements in Toledo for its growth and importance. The transcript of the annexation proceedings, and the accompanying map, show that the annexation consists in an extension of the original boundaries, so as to include the whole of the river and a considerable tract of land on its southeast side. There is no territory intervening between that which was annexed and the original city lim-

its. All the parts of the annexed territory are in immediate contact with each other; and the whole is in direct contact for several miles with the original boundary. Contiguity cannot import more than immediate contact; and we think the objection founded on a want of contiguity is not well taken." It is clear that the Toledo case in no way militates against the views we have expressed, but rather confirms them; none of the other cases cited by counsel sustain the view that noncontiguous territory may be added to and made part of a town or city; hence we conclude that the text of Judge Dillon above quoted cannot be accepted as correct to its full extent and import. The dearth of authority upon this point leads to the belief that legislatures have seldom, or never before, attempted to annex to an incorporated town or city territory so clearly noncontiguous as in the present instance.

It was argued orally that, while the legislature may not have the power to annex distant noncontiguous territory by a direct act for that purpose, yet in this case the Jefferson county strip must be regarded as a part of the city of Denver, for the reason that it is included in the boundary surveys as specified in the revised and amended charter, and that, unless so included, the city has no boundary lines, particularly on the west. This argument is without force. Equity looks to the substance rather than the form; it regards the result of an act rather than the mode of accomplishing it. There may be a wrong way of doing a right thing, but there is no right way of doing a wrong thing. An act essentially wrong does not become right by the manner of doing it. If the mode of making municipal additions as argued by counsel were to be upheld, any noncontiguous territory, however remote, might be surveyed in, and thus become attached to and made a part of, the city. The conclusion at which we have arrived need not disturb the boundary lines of the city as established by the amended charter, except on the west. As to these, the city limits must end where the insurmountable obstacles—that is, the territorial limits of the intervening municipalities—begin.

For the reasons stated, we are clearly of the opinion that the legislature did not have the power to extend or enlarge the territorial limits of the city of Denver by adding thereto the noncontiguous strip of lands situate in Jefferson county, and that the district court did not err in restraining the collection of taxes by or for the use of the city of Denver upon such Jefferson county property. This conclusion being decisive of the present controversy, other questions sought to be raised upon this appeal need not be discussed. The judgment of the district court is accordingly affirmed. Affirmed.[3]

[3] The opinion on rehearing is omitted.

2. What Territory May Be Annexed

VESTAL v. CITY OF LITTLE ROCK.

(Supreme Court of Arkansas, 1891. 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778.)

Hemingway, J. This appeal arises in a proceeding on the part of the city of Little Rock to annex to itself certain outlying and contiguous territory. The statute prescribes conditions, upon a compliance with which a municipal corporation may present to the county court its petition to annex to it contiguous territory lying in the same county. Mansf. Dig. § 922. It provides that when such petition is presented to the county court it shall fix a day for hearing thereon, of which notice shall be given, and that any person interested may appear and contest the granting of the petition. Id. § 786. It further provides that, if the court shall find that the prescribed conditions have been observed, and shall deem it reasonable and proper to grant the petition, it shall make an order to that effect. Id. § 787. A reversal of the order granting the city's petition under this statute is sought on two grounds: First, because the court exceeded its authority in ordering that lands be annexed that were not contiguous to the city; and, second, because it ordered that lands be annexed which it was unreasonable and improper to include within the city. Before considering them directly, we will state what we conclude from the many authorities to be the correct rule to guide in determining an application for annexation.

1. That city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market, and sold as town property, when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses. But the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation if it did not appear that such value was enhanced on account of their adaptability to town use.

2. We conclude further that city limits should not be so extended as to take in contiguous lands (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant, and do not derive special value from their adaptability for city uses. People v. Bennett, 29 Mich. 451,

18 Am. Rep. 111; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; City v. Southgate, 15 B. Mon. (Ky.) 491; Morford v. Unger, 8 Iowa, 82; New Orleans v. Michoud, 10 La. Ann. 763; Bradshaw v. Omaha, 1 Neb. 16. By contiguous lands we understand such as are not separated from the corporation by outside land; and we think the statute permits the annexation of any such lands, and that the court is justified in making an order to annex them, whenever they are so situated with reference to the corporation that it may reasonably be expected that after annexation they will unite with the annexing corporation in making up a homogeneous city, which will afford to its several parts the ordinary benefits of local government. But, however near they may be to the petitioning corporation, if they are so circumstanced with reference to it that it could not reasonably be expected that the parts would amalgamate and organize a municipal unit which would afford to each the ordinary benefits of local government, it would not be reasonable and proper to order their annexation. When actual unity is impracticable, legal unity should not be attempted, but the incongruous communities should be left to independent control. In all cases, however, where actual unity is practicable, legal unity should be ordered as promising the greatest aggregate of municipal benefits.

To sustain their first ground for reversal, appellants rely on the fact that the city is on one side and a part of the lands included in the order is on the other side of the Arkansas river; but we do not think this fact conclusive that the lands are not contiguous within the meaning of the act. The river is also included in the land annexed, and is therefore not a break to contiguity, nor an inseparable barrier to complete amalgamation of the communities upon its opposite banks. That intervening rivers do not prevent such amalgamation or the consequent building up and maintaining of a compact city is attested by common observation; and the supreme court of Ohio, in construing a provision in the same terms as that relied on, contained in a statute upon which our own appears to have been modeled, held that a city might annex territory on the opposite bank of a large river. Blanchard v. Bissell, 11 Ohio St. 96. See, also, Ford v. Incorporated Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031.

To sustain the ground that the annexation ordered was unreasonable and improper, reliance is had upon the fact just considered, and the further fact that the only means of communication between the communities on opposite sides of the river is afforded by two toll-bridges, and a number of small boats operated by private persons for hire. That such are the means of communication between the communities does not prove that they would continue to be the only means when the two, now separate, are blended in municipal union. While these are facts to be considered in determining whether annexation is proper and reasonable, they are not necessarily inconsistent with

the attainment of absolute unity, or the usual benefits of local government. To what extent they would tend to prevent it, and how far this tendency would be obviated by the action of the united communities, is a question of great uncertainty. It has been resolved against the appellants by the county court, to whose determination it is primarily committed, and again by the circuit court on appeal. Indulging the ordinary presumption in favor of the correctness of their finding, in a matter about which conclusions might well differ, we would certainly not be warranted in disturbing their finding. On the same ground reliance is placed upon the fact that the annexation includes 40 acres of land belonging to William Metz, which is vacant, low, flat, and wet, covered with timber, and, as it is claimed, for these reasons unsuited for town purposes. It has not been platted, but platted lands in the unincorporated town of Argenta touch it upon two sides to its entire extent. It does not appear how densely the adjoining lands are settled. Upon those facts we cannot say that the court was not warranted in finding that it was proper to annex this land. It may have been needed for town purposes, and it may have needed organized local government to reclaim the low, wet parts, and fit it for town uses. Such places are thus reclaimed in the ordinary course of town improvements, and become centers of population and business activity.

The last fact urged is the inclusion of 40 acres of land belonging to Joseph W. Vestal. It lies across the river from the corporation, and is from a half a mile to three-quarters of a mile distant from the unincorporated town. No streets of the corporation or village, or other town improvements, extend to it, and the line of city settlement has not reached it. It is not laid off for city uses. There is no settlement on it, and its proprietor cultivates it in his business as a florist and farmer. He remonstrated against its annexation upon the hearing in the county court, and by successive appeals renews his remonstrance here. He insists that his land is not needed, nor at present adaptable, for city uses; that it would not be enhanced in value by annexation, but that its annexation would subject it to taxation without any benefit or compensation to him; and the facts sustain his contention. Upon a similar state of case it has been held by some courts that land could not be subjected to municipal taxation, and never, so far as our information goes, that it ought to be. In this state all city property must bear alike the burden of ordinary city taxation, (Fletcher v. Oliver, 25 Ark. 289; Cary v. City, 88 Ill. 154, 30 Am. Rep. 543; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Washburn v. City of Oshkosh, 60 Wis. 453, 19 N. W. 364;) and in determining whether the annexation of particular lands is reasonable and proper, regard should be taken of this fact. Was it right and proper to include Vestal's land, and subject it to ordinary taxation for city purposes? He had no need of local government, and the city had no need of his

land. It could not afford him, even in a moderate degree, the ordinary benefits of city government, without an expense which it could not have contemplated without cause for remonstrance on the part of its residents.

The cases cited by the appellee arose upon resistance by taxpayers to acts of the legislature including their lands within cities. The courts said it was in the power of the legislature to pass the acts, and declined to inquire, for want of authority, whether it was morally wrong or practically unjust to pass them. 52 Miss. 53; Giboney v. Cape Girardeau, 58 Mo. 141; City v. Coulter, 58 Cal. 537; Washburn v. City of Oshkosh, 60 Wis. 453, 19 N. W. 364; Turner v. Althaus, 6 Neb. 54. Such is not our attitude towards the question in this case; and if this order, without the conclusiveness of legislative enactment or final judicial sanction, can be sustained, there is no reason why a corporation may not extend its control and power over all the farming lands of a county, if it observe one caution,—not to skip any as it advances. We recognize the weight that attaches to the findings of the court below, but the facts are undisputed, and admit of but one deduction, and that is that Vestal's farm and garden were not needed for city use, and that their annexation would subject him to the burdens, without the compensating benefits, of local government. Courts of wisdom and learning have upon the same facts, in the protection of private rights, set aside the solemn acts of a co-ordinate branch of the government. 15 B. Mon. 491; 8 Iowa, 82; 1 Neb. 16; and see County Com'rs v. President, 51 Md. 465; New Orleans v. Michoud, 10 La. Ann. 763; 2 Dill. Mun. Corp. § 795, and note; People v. Bennett, 29 Mich. 451, 18 Am. Rep. 111; Borough of West Philadelphia, 5 Watts & S. 281; Kelly v. Meeks, 87 Mo. 396.

Without committing ourselves to the entire approval of those cases, we cannot in the exercise of ordinary appellate jurisdiction ignore the considerations of justice and right that prompted them. Believing that the facts admit of no implication to sustain the judgment of the circuit court, we cannot do it. The statute provides that the county court may permit the petitioner to amend the petition so as to exclude land embraced within it. Mansf. Dig. § 786; Foreman v. Marianna, 43 Ark. 324. The circuit court tries the case de novo, and makes such order as the county court should have made, (Dodson v. Ft. Smith, 33 Ark. 517,) and it may therefore permit a like amendment unless restrained by other provisions of the statute, (sections 790, 916–922, Mansf. Dig.). We do not think they restrain it. Without determining their legal effect, it is sufficient to say we think they were intended to provide a cumulative remedy for a review of the action of the county court, and that the directions they contain as to the judgment to be rendered by the circuit court apply only when that remedy is invoked, and has no application to a proceeding by appeal.

For the error indicated the judgment will be reversed, and the

cause remanded to the circuit court. The petitioner should be permitted to make such amendments as it may deem proper in order to exclude from the petition lands that should not be annexed, and remonstrants should be permitted to resist granting the petition as amended. In order to prevent possible complications, we have thought proper to add that we think the order of annexation is wholly inoperative, at least after the judgment of reversal.

II. Consolidation [4]

STATE ex rel. RICHARDS v. CITY OF CINCINNATI.

(Supreme Court of Ohio, 1895. 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737.)

Original petition in quo warranto, in the name of the state against the city of Cincinnati, to test the validity of certain proceedings for the annexation of contiguous municipal corporations.

The petition alleges that the defendant, which is the only city of the first grade of the first class in this state, has instituted, and is about to carry to completion, proceedings to extend its corporate limits by annexation, so as to include the contiguous villages of Riverside, Westwood, Clifton, Avondale, and Linwood, and claims the right to do so, under and by virtue of an act of the general assembly passed April 13, 1893, entitled "An act to authorize cities of the first grade of the first class to annex contiguous municipal corporations of other grades or classes lying within any county containing such cities of the first grade of the first class," and an act amendatory thereof, passed April 24, 1893.

WILLIAMS, J.[5] * * * Another objection made to this statute is that the object sought to be accomplished by it, in the mode provided, is beyond the range of legislative authority, because it authorizes annexation, and consequently taxation, without the consent of those who are affected by it. The proposition of counsel, as stated in the brief, is: "If annexation of one municipal corporation to another be so authorized as to vest in the agencies empowered to effect the union final authority to require substantial taxes for objects accomplished, and purely local to the annexing corporation, to be imposed upon the taxable inhabitants of the municipality proposed to be annexed, then the exercise of power to annex must be founded in mutual consent." That the enlargement of the territorial boundaries of municipal corporations by annexation, and the consequent extension of their cor-

[4] For discussion of principles, see Cooley, Mun. Corp. § 34.

[5] The statement of facts is rewritten and part of the opinion is omitted.

porate jurisdiction, including that of levying taxes, are legitimate subjects of legislation, must be admitted; and hence, the extent to which such legislation shall be enacted, both with respect to the conditions and circumstances under which the annexation may be had, and the manner in which it may be made, rests wholly in the discretion of the general assembly, except in so far as limitations upon its power are contained in the constitution. Accordingly, legislation has been sustained, which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation. Powers v. Commissioners, 8 Ohio St. 285; Blanchard v. Bissell, 11 Ohio St. 96. In both of these cases it was held that the annexation might be made without the consent, and even against the remonstrance, of a majority of the persons residing on the annexed territory, that the lands thus annexed were liable to local taxation for the payment of the pre-existing indebtedness of the municipality, and that the statute authorizing such annexation was constitutional; the court saying in the first of the cases that there is no constitutional provision on the subject, and that "it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts until the owner of such territory were paid a compensation in money for a proportional part of such debt, on the ground that the property annexed was condemned for public use," and, further, that it is not "to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited." And in Metcalf v. State, 49 Ohio St. 586, 31 N. E. 1076, a statute was held valid which, in terms, detached from a city, without its consent, territory included in its corporate limits, and attached to it another taxing jurisdiction.

The principle established by these cases must control the decision of this one, so far as the question now under consideration is concerned, unless, as counsel for the plaintiff contend, the principle is inapplicable on account of the nature of the indebtedness of the defendant, or because the territory proposed to be annexed is already embraced in organized municipalities. The indebtedness of the defendant, which, it is claimed, distinguishes this case from those above referred to, is that incurred for what is known as the Cincinnati Southern Railroad, for waterworks, city hall, and some other local improvements, aggregating many millions of dollars. It does not appear what was the nature or amount of the indebtedness of the respective municipalities involved in the cases of Powers v. Commissioners, or Blanchard v. Bissell; and it should be presumed, counsel claim, that it was created for the necessary or usual governmental purposes, and not for local improvements. Allowing the presumption, it is not perceived how the amount or nature of the municipal indebtedness can affect the right of

annexation, if it be otherwise legal; for the power to bring into a municipal corporation, by annexation, property not theretofore subject to taxation for municipal purposes, and lay taxes upon it to raise funds for the payment of any previously existing municipal debt, necessarily includes the power to do so for the payment of every such debt lawfully incurred. Persons thus brought into the annexing corporation, and their property, like all of its other inhabitants and their property, receive and enjoy the benefits of all local improvements, and should share the burdens existing when the enjoyment commences; and, in like manner, the inhabitants of the annexing corporation enjoy the benefits and share the burdens arising from the local improvements of the municipalities annexed.

If a valid objection to the annexation could be predicated upon the nature of the indebtedness for the payment of which the property included in the annexation may be taxed without the consent of its owners, the reason would seem to be stronger for allowing it where the debt was incurred for purely governmental purposes; for the benefits derived therefrom are not continuing, nor the results tangible, like those arising from permanent public improvements, but may have entirely ceased, and so be no longer capable of enjoyment by the persons included in the annexation, except what may be attributed to good municipal government resulting from the expenditure. But the power of taxation does not rest upon the consent of the taxed, except as that consent is implied or shown in the enactment of laws by the representatives of the people, or is made requisite by legislation; and therefore taxes may be imposed, or authorized by the legislative body, within its discretion, for all public purposes, so long as the fundamental law is not violated. We cannot think that because the annexation authorized by the statute may result in the taxation of property, without the owner's consent, for the payment of the lawful indebtedness of the annexing corporation, the passage of the act was a usurpation of legislative power. If either of the municipalities sought to be annexed should be the owner of private property which may be taxed, it stands on the same footing as other owners of private property. Its rights can be no greater than theirs, and hence there can be no more necessity for its consent than for theirs; and property held by it for public purposes will continue to be held for such purposes, after the annexation is completed, until other lawful disposition is made of it.

Nor do we think the general assembly exceeded its legislative power in authorizing the annexation of municipalities of a lower grade to one of a higher grade. Grant its powers to annex, or provide for annexing to a city or village, adjacent territory, against the will of its owners and occupants, and there does not appear to be any satisfactory reason for denying the power where the territory is coextensive with the boundaries of another municipal corporation, especially when

there is no such limitation in the constitution. It is maintained by very high authority that it is clearly within the legislative discretion to extend or restrict the boundaries of municipal corporations, "or consolidate two or more into one." Cooley, Const. Lim. (6th Ed.) 228. And it is declared by Mr. Justice Clifford in Mt. Pleasant v. Beckwith, 100 U. S. 515–524, 25 L. Ed. 699, to be the constant practice for legislative bodies to divide or consolidate municipal corporations, and that such action is often necessary for the public interests and convenience. And in Meriwether v. Garrett, 102 U. S. 472–511 (26 L. Ed. 197) it is said by Mr. Justice Field: "Municipal corporations are mere instruments of the state, for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text writers. There is no contract between the state and the public that a charter of a city shall not be at all times subject to legislative control. There is no such thing as a vested right, held by any individuals, in the grant of legislative power to them." Many other authorities, much to the same effect, are cited in the brief of counsel for the defendant, which we deem it unnecessary to notice further. We have been referred to none maintaining the contrary doctrine, and have found none.

In the light of these authorities, we would be unwarranted in holding that the legislature transcended its powers in passing the act in question; and, observing in this case the well-established rule that the courts should not declare a statute unconstitutional unless convinced that it is clearly so, we hold the statute, in all respects, constitutional and valid. * * * The defendant, having shown that it is lawfully possessed of the privileges and franchises it is charged with exercising, is entitled to judgment. Judgment accordingly.

III. Operation and Effect of Annexation Division or Consolidation [6]

MT. PLEASANT v. BECKWITH.

(Supreme Court of United States, 1879. 100 U. S. 514, 25 L. Ed. 699.)

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Mr. Justice CLIFFORD delivered the opinion of the court.[7]

[6] For discussion of principles, see Cooley, Mun. Corp. § 35.

[7] Part of the opinion is omitted.

Explicit authority from the legislature was given to the supervisors of the town of Racine to subscribe for the stock of the railroad company mentioned in the act conferring the power, to an amount not exceeding $50,000, provided a majority of the legal voters of the municipality, at a meeting of the town duly called and held for the purpose, shall vote in favor of making the proposed subscription. Sess. Laws Wis. 1853, p. 11.

Pursuant to that authority, the proper officers of the town, on the 6th of December, 1853, subscribed for the capital stock of the railroad company to the amount of $50,000, and issued one hundred bonds of the corporation, each in the sum of $500, in payment of the subscription for the stock. * * *

Sufficient appears to show that on the 2d of January, 1838, the town of Racine and the town of Mt. Pleasant were by the same act created municipal corporations, with boundaries as set forth in the bill of complaint. Laws Wis. 1838, p. 168.

Four years later, the town of Caledonia was incorporated, her territory being taken from the two towns before mentioned, without any provision being made that the new town should bear any portion of the indebtedness of either of the old towns. Priv. Laws 1842, p. 10.

Both parties concur in these propositions, and it appears that the city of Racine, which is a distinct municipality from the town by the same name, was incorporated by the act of the 8th of August, 1848, with boundaries as correctly set forth in the transcript. Id. 1848, p. 80. * * *

Additional territory was subsequently taken from the town of Racine and was annexed to the city of Racine, and by a still later act another fraction of her territory was annexed to the town of Mt. Pleasant, neither act containing any regulations as to existing indebtedness. Id. 1856, pp. 148–416.

Prior to that, to wit, on the 6th of March in the same year, the legislature of the state, by an act of that date, annexed a much larger tract, taken from the towns of Racine and Mt. Pleasant, to the city of Racine, as described in the record; but the supreme court of the state decided that a certain feature of the act was unconstitutional and void. Slauson v. City of Racine, 13 Wis. 398.

In consequence of that decision, the towns from which the territory annexed was taken continued to exercise jurisdiction over it for the period of fifteen years longer, until a portion of the same territory then constituting a part of the town of Mt. Pleasant was again annexed to the city of Racine, on the condition that the city "shall assume and pay so much of the municipal indebtedness of the town as the lands described in the first section of that act may be or become legally chargeable with and liable to pay." Priv. Laws Wis. 1871, p. 723.

Throughout these several changes, except the last, the annexation in every instance was made without any regulation that the town to which the territory was annexed should pay any portion of the indebtedness of the town from which the territory annexed was taken. Still not satisfied, the legislature, by the act of the 23d of February, 1857, rearranged the boundaries of each of the three towns, as therein is fully set forth and described. Id. 1857, p. 103.

Two years later, the county supervisors changed the name of the town of Racine to Orwell; but the prior name will be used throughout in this opinion, as less likely to produce confusion in the statement of facts. From the time the legislature rearranged the boundaries of the three towns they remained without alteration until the legislature, March 30, 1860, by a public act, vacated and extinguished the corporation and body politic known as the town of Racine, then called Orwell, and enacted that thereafter it should have no existence as a body politic and corporate. Sess. Laws Wis. 1860, p. 218.

Section 2 of the act also provided that all that part of the territory of the town lying north of the described line should be annexed to and hereafter form a part of the town of Caledonia, and that all that part of the territory lying south of that line should become and continue to be a part of Mt. Pleasant. * * *

Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the state.

Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. Corporate rights and privileges are usually possessed by such municipalities; and it is equally true that they are subject to certain legal obligations and duties, which may be increased or diminished at the pleasure of the legislature, from which all their powers are derived.

Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the state in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between themselves and the legislature of the state, because there is not and

cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with every thing partaking of the nature of compact.

Instead of that, the constant practice is to divide large municipalities and to consolidate small ones, or set off portions of territory from one and annex it to another, to meet the wishes of the residents or to promote the public interests as understood by the legislature,—it being everywhere understood that the legislature possesses the power to make such alterations and to apportion the common property and burdens as to them may seem just and equitable.

Alterations of the kind are often required to promote the public interests or the convenience and necessities of the inhabitants; and the public history shows that it has been the constant usage in the states to enlarge or diminish the power of towns, to divide their territory by set-off and annexation, and to make new towns whenever the legislature deems it just and proper that such a change should be made. Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alteration of the boundaries as fixed by any prior law.

State legislation may regulate the subject; but if the legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to that the old corporation has no claim whatever. Laramie Co. v. Albany Co., 92 U. S. 307; Bristol v. New Chester, 3 N. H. 521.

Apply these principles to the admitted facts of the case, and it is clear that every one of the described changes made in the limits and boundaries of the respondent municipalities become wholly immaterial in this investigation, except the last two, as hereafter more fully explained.

Before the passage of those two acts, the claim of the complainant against the town of Racine was, beyond all question, valid and collectible. Nobody controverts that proposition, and it is clear that no defence to the action could have been sustained for a moment. By the act of March 30, 1860, the legislature of the state

vacated and extinguished the corporation and body politic formerly known as Racine, then called Orwell, and annexed the whole area of the territory included in the municipality to the two adjacent towns of Mt. Pleasant and Caledonia, in the proportions and by the boundary lines described in the second section of the legislative act. Had legislation stopped there, it is clear that the city of Racine would not have been liable for any portion of the debt of the extinguished municipal corporation; but it did not stop there, as appears by what follows.

Prior to the passage of that act, the old town of Racine was the sole obligor in the bonds held by the complainant; and there certainly is nothing in the provisions of that act which tends in the least degree to create any liability on the part of any other municipality for the indebtedness of that town, except the towns of Mt. Pleasant and Caledonia. Nothing had previously occurred to create any liability on the part of the city of Racine to pay any proportion of the debts of the old town of Racine, which issued the bonds described in the bill of complaint.

Until the passage of the act of the 17th of March, 1871, the rights of all parties remained unchanged. By that act a portion of the territory formerly belonging to the old town of Racine was set off from the town of Mt. Pleasant and was annexed to the city of Racine. Appended to that act, and a part of it, was the provision that the city to which the described territory was annexed "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay." Priv. Laws Wis. 1871, p. 723.

Enough appears in that provision of direct legislation to show that the city of Racine was thereby made liable for the debts of the extinguished town of Racine in the proportion therein described; and the clear inference from the provision is that the town of Mt. Pleasant, prior to the passage of that act, was liable for the debts of that old municipality in proportion to the whole extent of the territory annexed to her by the prior act which extinguished the old municipal corporation. None, it is presumed, will deny the liability of the city of Racine for those debts in the proportion described in the act creating the liability, and hence it is that the corporate authorities of the city acquiesced in the decree of the circuit court without appeal.

Parties who do not appeal from the final decree of the circuit court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous. The Stephen Morgan, 94 U. S. 599.

Concede that, and it follows that the only question open in the case for examination is whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. Gordon v. Lewis, 2 Sumn. 143, Fed. Cas. No. 5,613; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504. Nor do either of the assignments of error allege that the master committed any error in that regard. Brockett v. Brockett, 3 How. 691, 11 L. Ed. 786.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all they are liable for the respective amounts specified in the decree. Harding v. Handy, 11 Wheat. 103, 6 L. Ed. 429. Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, then it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. Morgan v. City and Town of Beloit, 7 Wall. 613, 617, 19 L. Ed. 203.

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. Town of Depere v. Town of Bellevue, 31 Wis. 120, 125, 11 Am. Rep. 602.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the supreme court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. Thompson v. Abbott, 61 Mo. 176, 177.

Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same cum onere, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. Swain v. Seamens, 9 Wall. 254, 274, 19 L. Ed. 554; Pickard v. Sears, 6 Adol. & E. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim. (4th Ed.) 232.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the state for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Broughton v. Pensacola, 93 U. S. 266, 269, 23 L. Ed. 896.

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or they may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. Colchester v. Seaber, 3 Burrows, 1866.

Neither argument nor authority is necessary to prove that a state legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the constitution are as sacred as the constitution that protects them from infraction, and yet the defence in this case, if sustained, will establish the proposition that the effect of state legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract;

but he ought always to be able by some proper action to reduce his contract to judgment.

Suppose it be admitted that the act of the state legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and, when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose,—the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the constitution forbids, that the appellant towns assumed each a proportionate share of the

outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over every thing belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general state law; and it is clear that their powers and duties differ in some important particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the crown, and acquired many of their privileges by prescription, without any aid from parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no provision is made, every one must submit to the will of the state, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. Sill v. Village of Corning, 15 N. Y. 297; Mayor, etc., of City of Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Borough of Dunsmore's Appeal, 52 Pa. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. North Hempsted v. Hempsted, 2 Wend. 109; Hartford Bridge Co. v. East Hartford, 16 Conn. 149, 171. * * * Affirmed.

JOHNSON v. CITY OF SAN DIEGO.

(Supreme Court of California, 1895. 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.)

Action by P. L. Johnson and others against the city of San Diego to determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable on certain territory excluded from that city. From the judgment rendered, defendant appeals.

HENSHAW, J.[8] Appeals from the judgment and from the order denying a new trial. Under an act of the legislature approved March 19, 1889 (St. 1889, p. 356), a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The act referred to was in its nature permissive. It provided for the calling of an election upon petition, at which election the qualified electors within the territory proposed to be segregated should vote separately from the other voters of the municipal corporation, and the votes cast in such territory should be canvassed separately from the votes cast by the other electors of the municipality. If a majority of the votes cast in the territory proposed to be excluded and a majority of the votes cast in the municipality proper should both be for the segregation, then, after certain formalities had been complied with, the territory should cease to be a part of the municipal corporation, "provided [so runs the law] that nothing contained in this act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion: and provided further that such municipal corporation is hereby authorized to levy and collect from any territory so excluded from time to time, such sums of money as shall be found due from it on account of its just proportion of liability for any payment on the principal or interest of such debts. * * *

Under this law, the territory known as the "Coronado Beach," which contains the land of these plaintiffs, was excluded from the corporate control of the city of San Diego. At the time of this exclusion, the city of San Diego had a bonded indebtedness of $484,000; and, after this exclusion, the city continued to assess and levy taxes upon the detached territory to meet the requirements of this bonded indebtedness, which taxes these plaintiffs duly paid. In 1893 the legislature passed an act entitled "An act providing for the adjustment, settlement and payment of any indebtedness existing against any city or municipal corporation at the time of exclusion of territory therefrom and the division of property thereof" (St. 1893, p. 536). Plaintiffs availed themselves of the provision of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego, was properly chargeable against the ex-

[8] Part of the opinion is omitted.

cluded territory. The demurrer of the defendant city to their petition was overruled; and the court, after hearing evidence, found the existence of the bonded indebtedness; that all of the moneys received by the city and evidenced by this indebtedness had been expended for a sewer system, for the purchase of school sites and the erection of school houses, for refunding a pre-existing debt of the city, and for clearing its titles to certain real estate, and for buying certain rights of way; and that no portion of the money had been expended upon or within the excluded territory. The value of the property belonging to the city at the time of the segregation was found to be $600,000, all of which remained within its boundaries and under its control after the segregation. It was further found that the city of San Diego had never made any improvements in the excluded territory, and had never owned any property in it. The ratio of the value of the excluded territory to that of the city immediately preceding the exclusion was as 1 to 14. Under these findings, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit, and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when, in accordance with the permissive act of the legislature (St. 1889, p. 356), they elected to segregate Coronado Beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city, with the understanding that they should continue to pay their pro rata share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation; and that, therefore, to the parties to this controversy the statute of 1893 has no applicability.

This contention is first met by the respondents with the declaration that the act of 1889 did not impose or mean to impose a pro rata liability upon the excluded territory, but only a liability for a just proportion of the debt, which proportion was a subject of future ascertainment or determination; and much nice argument is advanced in its support. But the language of the proviso, that "nothing contained in the act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion," would seem to be a comprehensive pronunciation that the segregated territory should, after exclusion, be held by the same liabilities as bound it before; and, as before its exclusion it was liable for its pro rata share of these debts, it must be that after exclusion it remained

subject to the same liabilities. We think, therefore, that, by the only just and reasonable interpretation of which the act in question is susceptible, the legislature, in permitting the division, exercised its undoubted power to adjust the burden of the existing corporate debt, and decreed that the excluded territory should continue to bear its former proportion of that burden.

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness after having, in the act of separation, declared in what manner it should be borne. Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the constitution, the legislature may increase or diminish the powers of such a corporation,—may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs." Cooley, Const. Lim. (6th Ed.) p. 229. "A city," says Mr. Justice Field, in New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature." This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes; or, as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." Dill. Mun. Corp. (4th Ed.) § 63.

The act of the legislature in relieving Coronado Beach from the corporate control of San Diego and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature, by the terms of the act segregating the territory, had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and indisputable. It is equally well-settled law that, when the act of segre-

gation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. People v. Alameda Co., 26 Cal. 641; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316; Town of Depere v. Town of Bellevue, 31 Wis. 120, 11 Am. Rep. 602; Laramie County v. Albany County, 92 U. S. 307, 23 L. Ed. 552; Lycoming v. Union, 15 Pa. 166, 53 Am. Dec. 575; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699; Layton v. City of New Orleans, 12 La. Ann. 515; Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205.

There is authority, however, holding that, when the legislature has spoken in the original act, rights vest under it which may not be impaired; and it is upon these cases that appellants rely. Thus, in Bowdoinham v. Richmond, 6 Greenl. 93, 19 Am. Dec. 197, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham, and incorporating a part of it into a new town, by the name of Richmond, enacted that the latter should be held to pay its proportion towards the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act, in destroying this right, impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation. The opinion, however, looks for authority to the case of Hampshire Co. v. Franklin Co. (decided in 1819) 16 Mass. 76. * * *

But, distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that, where the original act does not make disposition of the common property and debts, the legislature may at any subsequent time, by later act, apportion them in such manner as seems to be just and equitable. Under the decisions adopting this rule, the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories; and while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them,

and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things, and thus abandon its prerogatives, and strip itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned: In County of Richland v. County of Lawrence, 12 Ill. 1, the facts were that the former county had been carved out of the territory of the latter by an act making no disposition of the county property. The state had given to the county of Lawrence a large sum of money, which it held at the time of segregation. By a later act the legislature declared that the new county should be entitled to receive from the old a certain proportion of this fund, which sum the old county refused to pay under the claim of vested right and ownership. The supreme court upheld the act, declaring that there was no contract between the state and the old county, which was merely the state's agent. * * * In Layton v. City of New Orleans, 12 La. Ann. 515, the act of the legislature consolidating several municipalities into one government, known as the "City of New Orleans," provided that the debts of each should be liquidated by taxation upon its own inhabitants. Afterwards, by another act, it was provided that the debts should be paid by taxation uniformly upon all the property of the new city. The court held that the earlier act was not a contract, and no rights vested under it; and that, as in these matters the legislature is supreme, it could change its policy and readjust these debts. In Mayor, etc., of Baltimore v. State, 15 Md. 376, the court say: "The doctrine that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact that rises above and restrains the power of legislation cannot be applied to the legislature when exercising its sovereignty over public charters granted for the purpose of government."

Says Dill. Mun. Corp. (4th Ed.) § 189: "But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of part of another corporation, the legislature may provide for an equitable apportionment or division of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts; and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such

corporations to provide for their enlargement or division, and, incidental to this, to apportion their property, and direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of or change in the corporation, since, otherwise, the old corporation becomes, under the rule just above stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions and parts, and with several well-considered adjudications." To the same general effect are the cases of Laramie Co. v. Albany Co., 92 U. S. 307, 23 L. Ed. 552; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699; Scituate v. Weymouth, 108 Mass. 128; Willimantic School Soc. v. School Soc. in Windham, 14 Conn. 457; Town of Guilford v. Supervisors of Chenango Co., 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in People v. Alameda Co., 26 Cal. 641. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation, Contra Costa county owed for a bridge which had been constructed upon the territory set apart for Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts, the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power. And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter, since, in the first apportionment, the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest.

Nor, in the operation of the act in question upon the city of San Diego, can we perceive any hardship. It had at the time of the segregation $600,000, acquired while Coronado Beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it

should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado Beach was also benefited by these expenditures. In the same sense, San Mateo county is benefited by the public improvements of the city and county of San Francisco; but it has never been asserted that for such benefits a sister county should be called upon to pay. The judgment and order appealed from are affirmed.[9]

IV. Repeal of Charter and Dissolution [10]

PEPIN v. SAGE.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1904. 129 Fed. 657, 64 C. C. A. 169.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge.[11] This is an appeal from a decree charging the township of Pepin and the city of Wabasha, in the state of Minnesota, as the successors of the late village of Reads, in that state, with the payment of bonds issued by the village during its corporate existence, and apportioning the debt between the succeeding municipalities in the proportion that the taxable value of the property falling within each by reason of the dissolution of the village bears to the taxable value of the entire property within the village at the time of its dissolution. The facts are, briefly, as follows: The village of Reads was created by a special act approved March 5, 1868 (Sp. Laws 1868, p. 261, c. 34), out of territory partly within the township of Pepin and partly within the city of Wabasha. The bonds were issued by that village under authority of special acts approved March 6, 1868 (Sp. Laws 1868, p. 29, c. 16), and March 5, 1869 (Sp. Laws 1869, p. 211, c. 37), by the first of which it is provided that the faith of the village "or the municipal corporation which may succeed it" shall be pledged for the payment of the principal and interest of the bonds, and that to make such payment taxes shall be levied and collected upon the taxable property of the village in the same manner as other taxes are levied and collected in the village "or the municipal corporation which shall succeed it."

Before the actual issuance of the bonds, but after their issuance was authorized by statute and by a vote of the electors of the village, a

[9] See, also, Rumsey v. Town of Sauk Centre, ante, p. 83.

[10] For discussion of principles, see Cooley, Mun. Corp. § 36.

[11] Part of the opinion is omitted.

special act, approved March 5, 1869, again placed in the city of Wabasha the portion of the village which had been taken from the city when the village was created. A special act approved January 29, 1891 (Sp. Laws 1891, p. 551, c. 51), returned to the village the territory originally taken from the city, and from then until its dissolution the village covered the identical territory over which it was first erected. The charter or special law under which the village was created was repealed and the village dissolved by an act approved April 22, 1895 (Laws 1895, p. 798, c. 390), and taking effect February 6, 1896. Acting under the belief, generally shared by all, that this statute did not dissolve or disorganize the village, its inhabitants continued to elect officers, and through them to transact the business of the village and to govern its territory and people as theretofore until in 1899, when in proceedings in the nature of quo warranto prosecuted by the state a judgment of ouster was rendered against the village and those acting as its officers. State ex rel. v. Village of Reads, 76 Minn. 69, 78 N. W. 883. * * *

The present suit strongly resembles and has closely followed the one shown in Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699, where it was determined, in the absence of constitutional restrictions: (1) The creation, division, and dissolution of municipal corporations, and the powers to be exercised by them, are subject to the legislative control of the state creating them. (2) Where one municipality is legislated out of existence, and its territory is annexed to other municipal corporations, it belongs wholly to the Legislature to apportion between them the debts of the dissolved municipality, and to determine what proportion shall be borne by each; but in the absence of such legislation the municipal corporations receiving the territory of the one dissolved will be severally liable for its then subsisting legal debts in the proportion that the taxable property within it falls within them respectively, and the power of taxation to be exercised to pay such debts will extend to all the taxable property within their respective jurisdictions, and will not be restricted to the property and persons within the territory annexed. Other cases of similar import are Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; United States ex rel. v. Port of Mobile (C. C.) 12 Fed. 768; Brewis v. Duluth (C. C.) 13 Fed. 334; Laird v. De Soto (C. C.) 22 Fed. 421.

The principles announced and applied in Mt. Pleasant v. Beckwith are in full accord with the decisions of the Supreme Court of the state of Minnesota, so far as that court has spoken upon the subject. State v. City of Lake City, 25 Minn. 404, 414; City of Winona v. School District, 40 Minn. 13, 16, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687. Counsel for appellants practically concede that the law is as just stated, and they rely upon certain provisions of the Con-

stitution and statutes of Minnesota as controlling in the present case. Their first contention is that the territory within the village of Reads did not, upon its dissolution, fall within or become part of the township of Pepin and the city of Wabasha, and therefore the township and city are not the successors of the village, and are not charged with the payment of its debts. To support the contention they cite sections 33 and 34, ingrafted upon article 4 of the state Constitution by way of amendment in November, 1892, and section 258, Gen. St. 1894. So far as material, these are as follows:

"Sec. 33. In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The Legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district. * * * Provided, however, that the inhibition of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The Legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.

"Sec. 34. The Legislature shall provide general laws for the transaction of any business that may be prohibited by section one of this amendment [Sec. 33], and all such laws shall be uniform in their operation throughout the state."

"Sec. 258. Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided."

We think these provisions are not applicable to the act dissolving the village. Originally the township and city included the territory in question, and the special acts which placed it within the village contain no reference whatever to the township or city, or to their boundary lines, or to the statutes defining them. The statutes creating the township and the city were not at any time repealed, but were left in force. The township and the city were not at any time extinguished, but remained in existence under the operation of those statutes. The effect of the special acts creating the village and defining its boundaries was to except the territory covered by it from the township and the city and from the operation of the statutes creating them. Subject to that exception, the legislative will, as at all times registered and expressed in living, operative, and valid statutes—not enactments entirely repealed, either expressly or by implication—placed this territory in the township and city. When the special acts which by implication put that exception upon these statutes were repealed, the exception was at an end. These statutes and their definition of the boundaries of the township and city were then

operative as if there had been no exception. They did not need to be revived because they had not been repealed. Nor was any amendment, extension, or modification of them necessary to give them effective operation over the territory of the extinguished village. While carefully prohibiting the passage of local or special laws, including those changing the boundary lines of any city, village, or township, the amendment to the Constitution expressly permits the repeal of existing laws of that character, and impliedly, but not less certainly, permits the repeal to have the usual or ordinary effect of such a statute. This repealing act is confined to a direct annulment of the charter or special law creating the village and makes no attempt at any affirmative legislation or to give to the repeal any other than the usual or ordinary effect.

In respect of the constitutional provisions cited, our opinion may be stated in this manner: The express authority for the repeal of "any existing special or local law" is a limitation upon the inhibition against the passage of special or local laws, and withdraws such repealing acts from the operation of that inhibition. The act repealing the charter or law creating the village of Reads is within the express authorization, and is to be given the usual or ordinary legal effect of such an act. The changes wrought in existing conditions by giving this effect to an authorized repealing act are also within the express authorization, and not within the inhibition. Upon the dissolution of the village the territory embraced therein became part of the township of Pepin and the city of Wabasha, not because the repealing act changed the boundary lines of the township or city, but because it released that territory from the excepting effect of the charter or law creating the village; and when this was done that territory came within the boundaries of the township and city as theretofore lawfully defined, by valid statutes still subsisting, and therefore became part of the township and city, and was brought within their jurisdiction. In other words, while this territory was released from the effect of the village charter by the repealing act, it resumed its place in the township and city by reason of the statutes creating them and defining their boundaries. Of course, this result would not have followed if these statutes had been repealed in the meantime, or if the act repealing the village charter had provided—if it could do so without violating the inhibition against special or local laws—that the territory and inhabitants within the limits and jurisdiction of the village should be resolved into the body of the state, and be subjected to its immediate control. * * *

We are of opinion that the territory of the village, upon its dissolution, fell within the township and city, and made them the successors of the village. But it is urged upon us that this results in transferring the debts of one community to other communities which had no voice in the creation of the debts or in their transfer. In one sense

that is true, but the result of a ruling to the contrary would be distressing to contemplate. It would amount to a declaration that the state extinguished one of its municipalities under circumstances which make proceedings for the collection and payment of the municipal debts impossible. A result which imputes to a state such an indifference to the claims of justice and to the lawful engagements of the municipalities under its control is not permissible where another is possible under the law. The circumstances of this case do not permit such an imputation. The answer to the present insistence is given in Mt. Pleasant v. Beckwith, supra, where the court said (pages 529, 531, 100 U. S., 25 L. Ed. 699): "But in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the Legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. * * *" Affirmed.

V. Reincorporation [12]

BROADFOOT v. CITY OF FAYETTEVILLE.

(Supreme Court of North Carolina, 1899. 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610.)

Action by C. W. Broadfoot against the city of Fayetteville on coupons issued by the town of Fayetteville. From judgment for plaintiff, defendant appeals.

MONTGOMERY, J.[13] Under the provisions of an act of the general assembly of the session of 1881, the charter of the town of Fayetteville was surrendered and repealed. At its session in 1883, the general assembly created a taxing and police district out of the territory included in the boundaries of the old town of Fayetteville, the taxing and police district to be called "Fayetteville." Under the last-mentioned act, all of the property of the former town of Fayetteville was transferred to the custody and control of the board of commissioners appointed by the general assembly. The public buildings, streets, and squares, and the policing of the same, were placed under the charge of those commissioners. Taxes were levied by the general assembly, with a specification as to the purposes to which they were to be applied. The general assembly at its session of 1893 incorporated the inhabitants within the old territory of the town of Fayetteville under the name of the "City of Fayetteville." The plain-

[12] For discussion of principles, see Cooley, Mun. Corp. § 37.

[13] Part of the opinion is omitted.

tiff in 1880 and 1881, being the owner of 52 coupons cut from bonds executed by the town of Fayetteville, presented the same for payment; and, upon payment being refused, brought two actions against the town of Fayetteville to recover the amounts due on the coupons. Judgments were rendered at August term, 1882, of Cumberland superior court in the two actions in favor of the plaintiff; but, between the time of action begun and judgment rendered, the charter of the then defendant, the town of Fayetteville, was surrendered and repealed. * * *

The defendant admits the repeal of the charter of the town of Fayetteville, that the coupons have never been paid, that the judgments were entered against the town of Fayetteville after its charter had been surrendered, and that the inhabitants of the old town have been incorporated by the act of 1893 under the name of the "City of Fayetteville." The defendant avers, however, that the judgments procured by the plaintiff against the town of Fayetteville were void, and denies that the city of Fayetteville is the successor of the old town of Fayetteville, or liable on the coupons or on the judgments.

It is of the first importance, then, to consider whether the city of Fayetteville, the new corporation, chartered by the act of March, 1893, is so far the successor of the town of Fayetteville, the old corporation, as to be liable for its debts. If this question is answered in the affirmative, the statutes of limitation set up in the answer as a defense to the action will then have to be discussed and decided. This court at one time adopted the old common-law rule that, upon the civil death of a corporation, the grantors of its real estate took it by reversion, and the debts due to and from it were extinguished. Fox v. Horah, 36 N. C. 358, 36 Am. Dec. 48. This rule was changed by the court in the case of Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778, and that of Fox v. Horah, supra, was overruled. The debt, then, due to the plaintiff by the town of Fayetteville was not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal. Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Mobile v. U. S., 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; O'Connor v. City of Memphis, 6 Lea (Tenn.) 730.

Apparently, each corporation created by a separate charter is a distinct entity, and from this it may be argued with plausibility that no two successive corporations can be connected, unless they are connected by the terms of the act which created them. But that view must be often only apparently true. If, in the case of a municipal corporation, the old charter should be repealed and a new one granted, and the new one should include the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the old corporation used for public purposes be passed over to the possession and control of the

new corporation, without consideration from the new corporation, it would be difficult to appreciate how the property and the benefits of the old corporation could be received by the new one, without the shouldering of its responsibility by the new one. It must be that the creditors of a defunct municipal corporation, whose money and property have helped to build up and improve the wealth and influence of the old corporation (although they must submit when a charter is absolutely abolished, and while the old territory and people remain unincorporated), have the right in equity to have a new corporation, embracing the same territory, and the same inhabitants and the same taxable property, considered as the successor of the old, at least so far as its liabilities for the debts of the old corporation are concerned. When the old charter is repealed, and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new. Where the benefits are taken, the burdens are assumed. So strong has this view been impressed upon the courts that in O'Connor v. City of Memphis, supra, the court said: "But in no case have the courts ever failed to declare the identity or succession or continuity of the two corporations, where the same corporators and the same corporate property have passed to the new corporation. The terms of the charter have in such cases never been construed otherwise." The same doctrine was laid down in Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699, in Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896, in Wolff v. New Orleans, and in Mobile v. U. S., supra.

The acts of the legislature repealing the old charters of the cities of Memphis and Mobile, and reincorporating those cities, were passed on the same day; and it might be inferred that these acts were considered as one and the same in legislative intent. But in the case of Amy v. Selma, 77 Ala. 103, cited, indorsed, and approved with high commendation by the supreme court of the United States in Mobile v. U. S., supra, the acts were not simultaneously passed. The repealing act was passed in December, 1882, and the reincorporating act in February, 1883. In that case the supreme court of Alabama held that the act repealing the charter of the city of Selma was without effect or operation upon the liabilities of the city of Selma; that the act of February, incorporating the inhabitants and territory formerly embraced within the limits of the city of Selma, was a reorganization under the corporate name of Selma of the same corporators, and embraced substantially the same territory as the city of Selma; that Selma was the successor of the city of Selma, and liable for the payment of its debts. * * * In the case before us 12 years elapsed between the repeal of the charter of the town of Fayetteville and the incorporation of the city of Fayetteville; but we cannot see how that can alter the principle involved in the case. The foundation on which the liability of the new corporation rests is that the new corporation em-

braces the same territory, the same corporators, the same taxable property, and has received the property of the old incorporation without consideration; and for these benefits it must, in return, bear the burdens of the old corporation. The liability in such a case commences from the receiving of the benefits, and whether those benefits were received one or ten years, or more, from the repeal of the old charter, makes no difference.

But it is argued for the defendant that, even if the act of 1893 did have the effect to make the city of Fayetteville the successor of the old town of Fayetteville, yet the new corporation was not liable for the debts of the old corporation, but, on the other hand, was expressly prohibited from assuming the debts of the old town or from paying any part of them, except such as were provided for in the act of 1883; and the plaintiff claimed no benefit under that act. The position was without any citation of authority to support it, and to us it did not seem to be sound; and the authorities, so far as they have been examined by us, are all the other way. If the law was as is contended for by the defendant, then it would be in the power of the legislature to destroy the claims of creditors against municipal corporations by simply repealing their charters on one day, and on the next reincorporating the same inhabitants in the same territory, taking care to insert in the repealing acts a provision to the effect that the new corporation should not be liable for the debts of the old. Such legislation would be contrary to every idea of justice and law, and obnoxious to the constitution of the United States, and to that of our own state. In Amy v. Selma, supra, it appeared that the act incorporating Selma authorized the proper officials to levy taxes, but declared that no funds derived by the corporation from the collection of taxes or from any other source should be used for the payment of any of the debts of the city of Selma, the old corporation; and, as we have seen, the supreme court of Alabama in that case held that the provision was inoperative against the debts and liabilities of the city of Selma, and the supreme court of the United States in Mobile v. U. S., supra, cited the decision with marked approval. * * * Affirmed.[14]

[14] As to effect of reincorporation, see, also, City of Guthrie v. Territory, ante, p. 52, and Shapleigh v. City of San Angelo, post, p. 319.

THE CHARTER

I. Municipal Powers—Inherent—Express—Implied [1]

1. In General

McALLEN v. HAMBLIN.

(Supreme Court of Iowa, 1906. 129 Iowa, 329, 105 N. W. 593, 5 L. R. A. [N. S.] 434, 6 Ann. Cas. 980.)

Suit in equity to enjoin defendants who are the mayor, clerk, and aldermen of the town of Walker, from paying out or using any of the general funds of said town for the use of a team and driver in sprinkling the streets of said town, and from using water from the town waterworks system for street sprinkling. Defendants' general equitable demurrer to the petition was overruled, and a decree was entered as prayed. Defendants appeal.

Deemer, J. By statute cities and towns have power to improve and repair streets, have the care and supervision thereof, and are obligated to keep them open, in repair, and free from nuisance. Code, §§ 751, 753. The expenses connected therewith may be paid out of the general fund, or in some cases they may assess the cost thereof against abutting property. Code, § 779. They may contract and pay for water necessary for public purposes. Code, § 725. It appears from the allegations of the petition that the town of Walker owns and operates its system of waterworks; that certain citizens by private subscription purchased a street sprinkler, and donated the same to the use of the town; and that defendants, as the governing body of the municipality, hired a driver and team for the sprinkler, in order that the business streets of the village might be sprinkled. Defendants also allowed water to be taken from the system of waterworks belonging to the town for street sprinkling purposes, without charge therefor, and when this action was commenced were paying the driver and for the use of the team out of the general funds of the town. There was no ordinance or resolution providing for payments to the driver or for the use of the team. The action is bottomed on the theory that the defendants had no right to use the general funds of the town for paying the driver or for the use of the team, and that their action in permitting the water to be used for street sprinkling was and is unlawful.

[1] For discussion of principles, see Cooley, Mun. Corp. § 40.

Defendants contend that their action in the premises was for the improvement and care of the village streets, and that they had authority under the law to do as they did. But appellees say that the Legislature has not granted to towns the right and power to sprinkle streets, and to pay therefor out of the general revenues of the town. It is true, of course, that a municipality can exercise such powers, and such only, as are granted in express words, or such as are fairly and reasonably implied or incident to those granted, or such as are essential to the declared objects and purposes of the corporation, or as said in Heins v. Lincoln, 102 Iowa, 77, 71 N. W. 189: "Municipal corporations possess, and can exercise only the following powers: First, those granted in express words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." See, also, Aldrich v. Paine, 106 Iowa, 461, 76 N. W. 812.

We have referred to the statutes which confer upon town councils authority over streets, and find that they may improve and repair them, that they have the care and supervision thereof, and must keep the same open, in repair, and free from nuisances. They may also contract for a water supply for public purposes. They are not given express power to sprinkle streets, unless that be involved or implied in the grant of authority to improve, care for, supervise, and control the same. Water for street sprinkling is undoubtedly a public purpose within the meaning of the statute referred to, for the benefit is to others aside from those whose property directly abuts upon the street which is sprinkled. We are constrained to hold, that under the statutes referred to, towns have authority to pay for the sprinkling of streets. Such work is an improvement of the streets, in that it removes sources of filth, destroys or confines germs of disease, and conduces to the comfort, not only of the traveling public, but to all who may own property in the vicinity of the street. It makes it easier to travel over the highways, and removes many of the discomforts attendant upon the use of dirt roads in dry weather. True, the results are transient, and not permanent; but this is true of almost any improvement. None of them are everlasting or eternal. A board sidewalk soon rots out, and a pavement wears away from use or the action of the elements. Permanency, or the want of it, is not the true test, but rather the result to be obtained. That a street is improved by the use of water upon it to settle and allay the dust is too clear for argument. This being true, the acts complained of were within the implied, if not the express power, conferred upon the defendants. That street sprinkling is a public, rather than a private, improvement, is also too clear for discussion. See, as sustaining these propositions, State v. Reis, 38 Minn. 371, 38 N. W. 97; Savage v. City, 23 Or. 381, 31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688; West v. Bancroft, 32 Vt. 371; Sears v. Board, 173 Mass. 71, 53 N. E. 138, 43 L.

R. A. 834; Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247.

Street sprinkling is as necessary as street cleaning, and no one would contend, we think, that a town or city may not employ and pay men for cleaning its streets and crossings. There is no requirement that the matter be covered by ordinance or resolution. The work is not of such a nature as to require such formalities. The demurrer should have been sustained, and a judgment entered dismissing plaintiffs' petition.

The decree must be reversed, and the cause remanded for one in harmony with this opinion. Reversed and remanded.

GREEN et al. v. CITY OF CAPE MAY.

(Supreme Court of New Jersey, 1879. 41 N. J. Law, 45.)

This action was brought by Green & Platt, partners, to recover from the city of Cape May the price of a Babcock steam fire engine and ten fire extinguishers, alleged to have been sold by the plaintiffs to the defendants. A verdict was rendered for the plaintiffs. A rule to show cause why a new trial should not be granted was allowed by the trial judge.

REED, J.[2] The main contention by the counsel of the defendants is, that there was no power in the defendants, the city of Cape May, to make a contract for the purchase of a steam fire engine and extinguishers. If this is so, the contract in question is ultra vires and invalid. In turning to the charter of the defendants (P. L. 1851, p. 112), we find in sections 13 and 18 the source of whatever power the defendants possess relative to contracts like the one under consideration. In section 13, among the powers conferred upon the city council is the authority to pass ordinances for the prevention and suppression of fires, and to appoint and remove fire wardens, and, by ordinance, to prescribe the power and duty of such fire wardens, and of the fire engineers and firemen. The clause in section 18 confers the right to raise money by taxation for supporting the fire engine department. There is nowhere a specific grant of power to purchase engines and apparatus. The contention, therefore, is that such power does not exist. But this contention is not tenable. The rule that an express grant of power carries with it a grant of those powers necessarily or fairly implied in or incident to the power expressly granted, is indisputable. 1 Dill. Mun. Corp. § 55.

The power to suppress fires, etc., would be nugatory without the power to obtain the means by which the suppression can be effected. The authority to prescribe the power and duties of firemen and fire engineers implies that there shall be apparatus, in the management of

[2] Part of the opinion is omitted.

which duties shall arise and become the subject of municipal regulation. The power to organize a fire department unaccompanied with the power to equip the department with apparatus, would be as futile as the privilege of raising an army without the power to provide weapons or subsistence. The power to do either would imply the power to effectuate the intent involved in the grant by the execution of its incidents.

The contracts for the purchase of apparatus are clearly among the incidents of the grant. The power to purchase fire engines, has been, in several states, sustained under the authority of the city to make police regulations for public safety, which, it is held, confers the power to take measures for the prevention of fires. Whether the power to suppress fires arises from the general safety clause of the charter, or from express grant, it carries with it the right to purchase fire engines. 1 Dill. Mun. Corp. § 94. I therefore think the power to purchase the engine and extinguishers was in the defendants. * * * The rule to show cause is discharged, with costs.

---

2. General Welfare Clause

CITY OF CRAWFORDSVILLE v. BRADEN.

(Supreme Court of Indiana, 1891. 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.)

Bill by Hector S. Braden to enjoin the city of Crawfordsville from supplying private citizens with electric light. From a decree overruling defendant's demurrer, and allowing a perpetual injunction, defendant appeals.

McBride, J.[3] The question we are required to decide in this case is, has a municipal corporation in this state the power to erect, maintain, and operate the necessary buildings, machinery, and appliances to light its streets, alleys, and other public places with the electric light, and at the same time, and in connection therewith, to supply electricity to its inhabitants for the lighting of their residences and places of business. Some other questions are incidentally involved, but the principal controversy is as above stated. That a city or an incorporated town may buy and operate the necessary plant and machinery to light its streets, alleys, and other public places is not controverted by the appellee; but he denies the right to furnish the light to the individual for his private use.

The question is argued on the theory that, if the city has such power, it must be by virtue of some express legislative grant, and is not

[3] Part of the opinion is omitted.

among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be strictly construed; and that, strictly construed, no statute confers the necessary authority. The purchase of the necessary land, machinery, and material, and the erection and maintenance of such a plant, does involve the exercise of the taxing power. The necessary funds must be supplied by taxing the tax-payers of the municipality. The only statute bearing directly upon this question is the act of March 3, 1883 (Elliott's Supp. § 794 et seq.). Section 794 contains the following: "That the common council of any city in this state, incorporated either under the general act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns in this state, shall have the power to light the streets, alleys, and other public places of such city and town with the electric light and other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and other public places with the electric light or other forms of light, on such terms, and for such times, not exceeding 10 years, as may be agreed upon." Section 795 provides that, for the purpose of effecting such lighting, the common council of a city or board of trustees of a town may provide, by resolution or ordinance, for the erection and maintenance in the streets, etc., of the necessary poles and appliances. Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants of the corporation. Section 797 validates contracts of a certain character, made before the enactment of the statute; and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns," or the public and private places of their inhabitants, with the electric light," etc.

It will be observed that, while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not, in terms, give any such power to the corporation. It will, therefore, be necessary for us to inquire if the corporation possesses such power independently of the statute, or, if not, if the statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power. In the case of Gas Co. v. City of Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388, this statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys, and other public places, and it was held that the statute was sufficient to confer that power. In that case the court, after announcing the conclusion above stated, used the following language: "If there were any doubt as to the meaning of the act, it would be removed by considering it, as it is our duty to do, in connection with the general act for the incorporation of cities; for

that act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge Dillon designates as 'general welfare' clauses. Our own decisions fully recognize the doctrine that municipal corporations do possess, under the general act, authority as broad as that here exercised, and the operation of that act is certainly not limited or restricted by the act of 1883."

The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, nor make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dill. Mun. Corp. (4th Ed.) § 89. Judge Dillon, however, quotes approvingly from the supreme court of Connecticut as follows (section 90, p. 147): "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant cannot be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations that they may exercise all the powers, within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." Bridgeport v. Railroad Co., 15 Conn. 475–501.

This principle has been repeatedly recognized by this court. Thus in Smith v. City of Madison, 7 Ind. 86, it is said: "The strictness, then, to be observed in giving construction to municipal charters, should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted." Again, in Kyle v. Malin, 8 Ind. 34–37, the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by the statute. Within these limits, they are to be favored by the courts.

Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this state are those grouped under the somewhat comprehensive title of "police powers,"—a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual, both in respect to his personal conduct and his property, and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order, and general welfare of the inhabitants. The police power primarily inheres in the state; but the legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers.

Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to, and which may be exercised by, such corporations. In many cases, the powers thus enumerated are such as would be implied by the mere fact of the incorporation. Where powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or, rather, of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. Clark v. City of South Bend, 85 Ind. 276, 44 Am. Rep. 13; Bank v. Sarlls, 129 N. E. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent either from express declaration, or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise; the legislative will being as to such matters supreme. Among the implied powers possessed by municipal corporations is the power to enact and enforce

reasonable by-laws and ordinances for the protection of health, life, and property. Thus, in this state it has been held that, independently of any statutory authority such corporations possess the inherent power to enact ordinances for the protection of the property of its citizens against fire. Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Bank v. Sarlls, supra; Hasty v. City of Huntington, 105 Ind. 540, 5 N. E. 559; Clark v. City of South Bend, 85 Ind. 276, 44 Am. Rep. 13; Corporation of Bluffton v. Studabaker, 106 Ind. 129, 6 N. E. 1. This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating building and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing a supply of water. Corporation of Bluffton v. Studabaker, supra. In the case of City of St. Paul v. Laidler, 2 Minn. 190, (Gil. 159,) 72 Am. Dec. 89, the supreme court of Minnesota, after holding that a municipal corporation is "a creature of the law, and in the exercise of its authority cannot exceed the limits therein prescribed," says: "It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature;" and then says further: "Incidental to the ordinary powers of a municipal corporation, and necessary to a proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits."

If this statement is correct, it follows that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute; but that, by the act authorizing the organization of the corporation, the legislature expressly delegates to the municipality the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly, because their exercise is necessary to the accomplishment of the objects of the incorporation. When a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of Kyle v. Malin, supra, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction. It is, of course, important and necessary to know in each case that the power claimed is in fact included in the implied powers of the corporation.

There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. * * * Wherever men herd together, in villages, towns, or cities, will be found more or less

of the lawless and vicious, and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen. Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; 15 Amer. & Eng. Enc. Law, 1046, and authorities there cited. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

The only authority cited which holds a contrary doctrine is that of Spaulding v. Inhabitants, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397. We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishery to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets, and transported from place to place like oil. We take judicial notice of the laws of nature and of nature's powers and forces, and therefore take judicial notice of that which is known as "electricity," and of its properties; not, of course, of the various methods of generating and transmitting or using it, but of the thing itself, and of its nature. As in many other cases, here the judicial presumption outruns the fact, and we are supposed to know and to take judicial notice of more than we can in fact know in the present state of scientific knowledge. We must know, however, that it cannot be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets, or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant by invoking and exercising the power of eminent domain.

The corporation possessing, as it does, the power to generate and distribute throughout its limits electricity for the lighting of its streets and other public places, we can see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and

health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here, again, is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health. But little authority has been cited bearing on the precise question, and we have been able to find but little. * * *

While the authorities on the precise question are meager, we think the weight of authority, as well as of reason, tends to sustain the right of the municipality through its proper officers, acting in the exercise of a sound discretion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business. * * * Reversed.

TOWN OF NEWPORT v. BATESVILLE & B. RY. CO.

(Supreme Court of Arkansas, 1893. 58 Ark. 270, 24 S. W. 427.)

Action by the Batesville & Brinkley Railway Company against the town of Newport on a contract for the construction of a levee. From a judgment for plaintiff, defendant appeals.

HUGHES, J.[4] The facts in this case are substantially as follows: The town of Newport made a contract with the Batesville & Brinkley Railway Company to construct a levee on two sides of the town to protect it from overflow, and was to pay the company therefor, in the warrants of the town, $10,000, and the railway company was to have the privilege of using the levee as a roadbed for its railway. One line of the levee was completed, accepted, and paid for by the town, after which it declined and refused to accept and pay for the other line of the levee, one of these lines being north, and the other south, of the town. The company having, as it contends, completed the levee according to the contract, brought this suit to recover a balance of $4,480, which it alleges to be due on the contract. * * *

Had the incorporated town of Newport the power to make the contract which was the foundation of this suit? In 1 Dill. Mun. Corp. § 89, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the

[4] Part of the opinion is omitted.

courts against the corporation, and the power is denied." In Spaulding v. City of Lowell, 23 Pick. (Mass.) 71, 74, Chief Justice Shaw, in speaking of municipal and public corporations, says: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." Bank v. Town of Chillicothe, 7 Ohio, pt. 2, pp. 31, 35, 30 Am. Dec. 185; Port Huron v. McCall, 46 Mich. 565, 10 N. W. 23. "They act, not by any inherent right of legislation, like the legislature of the state, but their authority is delegated, and their powers, therefore, must be strictly pursued."

Is there any express grant of power to an incorporated town to make a contract for the building of a levee? Section 740, Mansf. Dig., provides that "the city council shall have power to establish and construct and to regulate landing places, levees," etc. Section 8 of the incorporation act of March 9, 1875. This refers to cities of the first and second class, but not to incorporated towns. Their powers are not always the same. In enumerating the powers of municipal corporations of all classes in section 18 of the act of March 9, 1875, the power to construct levees is not given, though, as we have seen, it is given in section 8 of the act to cities of the first and second class. It follows, therefore, that there is no express grant of power to incorporated towns to construct levees.

Construing the powers of municipal corporations strictly, does it appear beyond "any fair, reasonable doubt" that the power of an incorporated town to make a contract for the construction of a levee exists? Is such power "necessarily or fairly implied in or incident to the powers expressly granted," or is such a power "essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable?" It does not appear to us that it is necessary that an incorporated town should possess such a power, in order to the exercise of its corporate powers, the performance of its corporate duties, and the accomplishment of the purposes of its organization. Unless such is the case, the power is not implied from the grant of general powers to an incorporated town. Spaulding v. City of Lowell, 23 Pick. (Mass.) 71, 74. No "long-established and well-settled usage" appears to have existed with incorporated towns to exercise the power to construct levees. In Minturn v. Larue, 23 How. 435, 16 L. Ed. 574, the court said: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the acts, or derived therefrom by necessary (fair and reasonable)

implication, regard being had to the objects of the grant. Any ambiguity or doubts arising out of the terms used by the legislature must be resolved in favor of the public." Thomson v. Lee Co., 3 Wall. 327, 18 L. Ed. 177. In Leonard v. City of Canton, a good reason is given for the rule that grants to corporations by the legislature should be strictly construed. It is because they "are invested with a portion of the authority that properly appertains to the sovereign power of the state," and the state never surrenders its just authority save by grants that are clear and unambiguous. 35 Miss. 189. When the exercise of power by a municipal corporation will result in the imposition of burdens or taxes upon the inhabitants, the existence of the power ought to be clear, beyond a fair, reasonable doubt. A different rule might lead to mischievous and oppressive consequences.

We are of the opinion that the incorporated town of Newport, in making the contract for the construction of the levee in this case, acted without either express or implied power, and that the contract was therefore void. * * * Reversed.

II. Exercise of Powers [5]

CITY OF BIDDEFORD v. YATES.

(Supreme Judicial Court of Maine, 1908. 104 Me. 506, 72 Atl. 335, 15 Ann. Cas. 1091.)

Trespass quare clausum by the City of Biddeford against Frederick Yates. Case reported to the law court.

SPEAR, J.[6] This is an action of trespass involving the validity of a lease of the plaintiff to the defendant. There is no material dispute upon the facts. The locus in quo is the "opera house," so called, embracing the hall in the city building and used for the purpose of giving plays, operas, etc., together with all the rooms and appurtenances belonging to and connected with the hall. On May 24, 1904, the plaintiff was the owner of the hall and appurtenances. On the same day the city council by its committee on public property made and delivered to the defendant an instrument, purporting to be a lease of the hall, expiring June 1, 1907. On February 20, 1907, another city council by the same committee made a second instrument purporting to be a lease of the same hall to take effect, in futuro, at the expiration of the first lease, to wit, June 1, 1907, for a term of three years from the latter date. Between February 20, 1907, the date of the second lease, and June

[5] For discussion of principles, see Cooley, Mun. Corp. § 41.

[6] Part of the opinion is omitted.

1, 1907, when it was to take effect, the term of office of the city officials under whom this lease was made had expired, and on the third Monday of March a new city government had been inaugurated.

On the 10th day of June, the city council passed the following order: "Ordered that the city solicitor be, and hereby is, authorized to obtain possession of the opera house and to adopt any proceedings that he may deem necessary therefor, including the institution and prosecution of any action at law or equity."

On the 23d day of August, 1907, the city solicitor, whose official capacity is admitted, took physical possession of the leased premises without the knowledge or consent of the lessee, for the express purpose of excluding him therefrom, and notified the defendant of his assumption of possession and the purpose thereof and to abstain from any interference therewith. On the 24th day of August, Yates, the lessee demanded of the city solicitor permission to enter, without being obliged to break in, claiming a right of occupancy under the instrument purporting to be a lease dated February 20, 1907. Being refused admission, he forcibly entered and took possession of the hall.

This was the only public hall owned by the city of Biddeford from May 1, 1904, to the date of the plaintiff's writ. The charter of the city of Biddeford contains the following clause: "The city council shall have the care and superintendence of city buildings and the custody and management of all such property, with power to let or sell what may be legally let or sold." Under the city charter admitted to have been duly accepted, authorizing the establishment of by-laws and ordinances for the government of the city, was promulgated in 1887 the following ordinance:

"Chapter 15. City Building. Section 1. The committee on public property shall have the care and custody of such building and its appurtenances, and all the alterations and repairs thereof. Sec. 2. The said committee are authorized to lease any part of said building not already under lease or appropriated to any of the branches of the city government for any period not exceeding the term of three years, and upon such terms and conditions as they may deem expedient, subject, however, to the approval of the mayor and aldermen." * * *

Plaintiff admits the authority of the city government to lease the opera house, if of that species of city property that "may be legally let," but the city claims that the property covered by the second lease was "already under lease," and therefore within the exception of the ordinance. Chapter 15, § 2. We think this position untenable. The second lease did not take effect until after the expiration of the term of the first one, and therefore cannot be said, in the sense in which the ordinance should be construed, to cover property "already under lease." The interpretation of this phrase

as claimed by the plaintiff would prevent the city from renewing a lease even a day before it expired. Such construction is contrary to all business methods and should not be established unless the language of the ordinance expressly requires it. The phraseology does not require it, but rather its usual and ordinary meaning, the one naturally suggested, is that the city should not execute two leases covering the same property for the same period of time. If the ordinance was intended to mean any more than this, it could easily have been made to say so; and, if the construction claimed by the plaintiff had been in the mind of the legislature, it would have said so. It would never have left so important and unusual a provision, if intended to mean what the plaintiff claims, to be established by the uncertain interpretation permissible by the language employed.

Again, the plaintiff contends that the premises let were public property, and could be rented only for public purposes (Thorndike v. Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463; Goss v. Greenleaf, 98 Me. 436, 57 Atl. 581), and could be used for private purposes when not needed for public use (Reynolds v. Waterville, 92 Me., dissenting opinion, page 317, 42 Atl. 559, and cases cited), and that under the leases in question the public use was made subservient to the private use. The agreed statement does not furnish any evidence of this contention, and, so far as it goes, tends to show the reverse; it being admitted that the part of the city building known as the "opera house" was not appropriated to the use of the city, and was reserved for Memorial Day, for the graduation exercises of the high school, and necessary rehearsals therefor. The lessee was also required to let the hall, when not otherwise engaged in good faith, on the payment of running expenses for any public purpose upon application by the mayor, to any political body in the city at the request of the chairman of respective city committees, and to any established church in the city one day in each year to each such church. It appears that the opera house was subject to all these public uses free from any charge except the running expenses. These would have to be paid by some one, whether the city or the lessee was in control of the hall.

Our conclusion is that under section 4 of the charter, which provides that the city council shall have "power to let or sell what may be legally let or sold," the first question should be answered in the affirmative. We need not look beyond the city charter for authority to exercise this power on the part of the city, as the charter is an act of the Legislature, and the section under consideration violates no provision of the Constitution.

Whether the city government could delegate authority to a committee to let city property depends entirely upon whether the delegation of such authority invested the committee with judicial or ministerial powers. "Functions which are purely executive, ad-

ministrative, or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative, or discretionary which cannot be delegated." A. & E. Encyc. of Law, vol. 20, p. 1218. These duties may be simplified by classing them under the head of "ministerial and judicial functions," as the act of every public official is either ministerial or judicial. People v. Jerome, 36 Misc. Rep. 256, 73 N. Y. Supp. 306. A purely "ministerial duty" is one as to which nothing is left to discretion. "Judicial acts" involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.

No question is raised as to the authority of the city council to appoint a committee on public property, and none could be raised, provided they invested the committee with ministerial powers only. Hence the issue here presented is: "Did the ordinances, under which the committee acted, confer upon it ministerial authority only, or did it go further and clothe it with judicial powers?"

To determine this issue, let us analyze the ordinance in question and discover just what powers it did confer upon the committee on public property. The Legislature in granting the charter invested the committee with power to let "what may be legally let." The ordinance authorized the committee to lease any part of the building not already under lease or appropriated to the use of the city for any period not exceeding three years. It has already been determined that the lease embraced only what might be "legally let." So far the authority of the ordinance comports with that of the charter. The substance of the act conferred by the charter was the right to lease. The appointment of a committee by an ordinance was a proper and convenient way to carry out the details of the right conferred. Without any ordinance at all, the city council could have let the hall. The charter so provided. The ordinance, therefore, was made, as all ordinances are, for the purpose of prescribing a permanent method of transacting the particular business involved. Therefore the language of the ordinance that the committee may lease "upon such terms and conditions as they may deem expedient" involves simply those ministerial acts necessary to perform the act of leasing. In the light of the context which determines that a lease may be made, what shall be let, and the term of the lease, this clause seems to have been used for the purpose of authorizing the committee to negotiate the various details which might arise in connection with the transaction involved. Those things which it would be impossible for an ordinance to prescribe in detail were left to the action of the committee. An illustration of this point is found in the present case, where the specifications, submitted by the lessee, prescribing various things which he stipulated to do, embrace 3 full pages and from 20 to 30 different items. * * *

The right of the city council to delegate its authority to a committee to perform acts which the council itself might legally do was raised in Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, in which the court hold: "If the city council had lawful authority to contract the sidewalks, involved in it was the right to direct the mayor and the chairman on streets and alleys to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true the city council could not delegate all the power conferred upon it by the Legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case."

This case also clearly determines that, when a city council is authorized to make a contract, it can appoint a committee to negotiate the details. To the same effect is Han. & St. Jo. R. R. Co. v. Marion County, 36 Mo. 296, in which it was contended by the defendant that the county court was the only agent authorized by law to issue instruments in payment to subscribers for stock, and that the instruments were not issued by the court, but by certain justices appointed by the court, and that their act was not binding on the defendant; that is, that the county court could not delegate its authority to the persons named. But the appellate court held otherwise, saying: "When the Legislature empowered the county court to subscribe stock to the railroad company, it also clothed it with the means which might be convenient for making its action effectual. The substantive act was the taking of the stock."

To the same effect, also, is Collins v. Holyoke, 146 Mass. 298, 15 N. E. 908, where the court say: "It is true, as contended by the petitioner, that the mayor and aldermen could not delegate the authority given them by the Public Statutes of 1882 (chapter 50, § 1) to lay and make common sewers; but no suggestion is made that the sewer was not legally laid, and it is only objected that it was 'built under the direction and supervision of a committee composed of four members of the common council and three aldermen.' But this was done by the order of the mayor and aldermen. The statute which gave them authority to make the sewers did not preclude them from employing agents to supervise and direct the work." Hence it appears from this opinion that the substance of the thing which could not be delegated was the laying out of the sewer, and not the details involved in its construction, some of which must necessarily have embraced the negotiating of contracts.

The third objection raised by the plaintiff to the legality of the lease is based upon the fact that one city council made the lease to take effect, in futuro, under another.

But it must be observed that, while the personnel may have been different, the city council under which the lease took effect was precisely the same tribunal under the charter and the ordinances

that executed the lease. The plaintiff, however, contends that the fact of an election between the execution of the lease and the beginning of its term, involving a possible change in the personnel of the new city council, made the attempt to execute a lease, to thus take effect, an invasion of the prerogatives of the new board; but we are unable to discover any substantial reason in support of this contention. While the personnel of a city government may change, the tribunal itself is a continuous body. As was said in Collins v. Holyoke, supra: "The membership of the defendant board is not the same as when the assessment in question was made; but, while its members change from time to time, the board itself as a tribunal is continuously the same." See, also, Fairbanks v. Fitchburg, 132 Mass. 42. While one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government, composed of a different set of individuals, yet what the individuals of different city governments might do can in no way affect the right of the tribunal as a city government to act upon any measure properly before it. What the individuals may do as a matter of opinion is one thing, but what the tribunal, a perpetual body is empowered to do as a matter of authority, is quite another thing.

It appears to us that the logic of the plaintiff's contention tends to limit a city council to action with respect to such matters only as are to go into effect under its own administration. Such limitation would segregate a municipal government from all other corporations and business institutions, in the methods employed for the transaction of business, and might, it seems to us, prove highly detrimental. A municipal government, represented by its city council, should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter. When not limited to a prescribed method, it should be permitted to act with the same business foresight that is accorded to other business institutions. A corporation or individual dealing in the letting of property might find it of the highest importance to make a lease to-day to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self-evident.

We have seen that the city council itself was empowered to make the lease in question and could delegate authority to a committee to negotiate its terms. We are therefore of the opinion that a lease thus legally executed is not void from the fact that it is made by one city council to take effect, in futuro, under another. Judgment for the defendant.

PROCEEDINGS AND ORDINANCES

I. The Governing Body [1]

1. De Facto Council

ROCHE v. JONES.

(Supreme Court of Appeals of Virginia, 1891. 87 Va. 484, 12 S. E. 965.)

Fauntleroy, J.[2] This is an appeal from a decree of the circuit court of Elizabeth City county, pronounced on the 7th day of February, 1890, in a chancery cause in which the appellants, W. W. Roche and others, (licensed liquor-dealers under the laws of the state,) are complainants, and I. L. Jones, sergeant of the town of Hampton, Va., and Jesse S. Jones, treasurer of said town, are defendants. The prayer of the bill was to restrain and perpetually enjoin the aforesaid defendants from collecting the license tax imposed by an ordinance of the council of the said town of Hampton, passed 28th June, 1889. An injunction was awarded, according to the prayer of the bill on the 17th of July, 1889, by the judge of the corporation court of the city of Norfolk; and on the 7th day of February, 1890, the circuit court of Elizabeth City county, by the decree appealed from, dissolved the said injunction, and dismissed the bill of complainants.

The validity of the tax is assailed because it is alleged that the fourteenth section of the act approved May 23, 1887, entitled "An act to incorporate the town of Hampton," which reads as follows: "J. S. Darling and J. W. Richardson, from the First ward; A. D. Wallace and James McMinamin, from the Second ward; and Luke B. Phillips and John W. Williams, from the Third ward,—are hereby declared and appointed councilmen of the said town, to be qualified as prescribed by law, and they shall constitute the council of said town until their successors are elected and qualified,"—is in conflict with that portion of the twentieth section of the sixth article of the constitution of Virginia which provides that "all city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the general assembly shall designate." This assignment of error is not well taken. The section is merely enabling, and plainly intended to apply only to offi-

[1] For discussion of principles, see Cooley, Mun. Corp. § 45.

[2] Part of the opinion is omitted.

cers to be chosen, under the constitution, after the municipal government became fully and regularly established, and not to officers appointed by the act itself to perform requisite duties until a regular election could be held. The Richmond Mayoralty Case, 19 Grat. (60 Va.) 674.

The legislature created the office, and it existed de jure; and the incumbents, named and appointed by the act itself to start and put into operation the organization of the town, were constitutionally appointed, and, so far as the validity of their acts is concerned, they were clothed with the insignia and authority to exercise the powers and functions of their appointment. See Norton v. Shelby Co., 118 U. S. 444-447, 6 Sup. Ct. 1121, 30 L. Ed. 178, and cases cited; Leach v. People, 122 Ill. 420, 12 N. E. 726; Clark v. Town of Easton, 146 Mass. 43, 14 N. E. 795. It is contended that section 14 of the said act of incorporation is in conflict with section 1016 of the Code of 1887, which applies expressly and only to cities containing a population of 5,000 or more, and having a corporation or hustings court, and cannot apply to the town of Hampton; but, even if the contention were well taken, the conflict could not affect the validity of the acts de facto of the council named by the charter. And we think the intention of the legislature is plain to provide, by the fourth section of the charter, for the election of the regular and permanent officers of the town; and by the fourteenth section, for the requisite officers until such election could be held.

The fourth objection raised is that the tax was levied by less than a two-thirds vote of the council, and is therefore in violation of the requirement of section 1035 of the Code of 1887. The council is composed of six members, four of whom constitute two-thirds. Five members were present at the meeting which passed the tax ordinance, four of whom voted for, and one against, the ordinance. It is alleged that Councilman A. D. Wallace, who voted for the ordinance, had, about two weeks before its passage, moved his residence beyond the corporate limits of the town, and had thereby vacated his office of councilman, and that consequently his vote was a nullity. But this is a non sequitur, as Wallace had continued to exercise his office as councilman, and to discharge its functions, until 1st July, 1889, when his successor qualified. He was a de facto councilman, and his acts as such were valid and binding. Monteith v. Com., 15 Grat. (56 Va.) 172; Griffin's Ex'r v. Cunningham, 20 Grat. (61 Va.) 40; McCraw v. Williams, 33 Grat. (74 Va.) 513; Blackw. Tax Titles, pp. 100, 103. * * * Affirmed.

MAGNEAU v. CITY OF FREMONT.

(Supreme Court of Nebraska, 1890. 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436.)

See post, p. 119, for a report of the case.

II. Mode of Action [3]

In re WILSON.

(Supreme Court of Minnesota, 1884. 32 Minn. 145, 19 N. W. 723.)

MITCHELL, J.[4] Section 5, c. 4, of the charter of the city of Minneapolis, provides: "The city council shall have full power and authority to make, ordain, publish, enforce, alter, amend, or repeal all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient; and in and by the same to declare and impose penalties and punishments, and enforce the same against any person or persons who may violate the provisions of any ordinance passed and ordained by it; and all such ordinances are hereby declared to be and to have the force of law, provided that they be not repugnant to the laws of the United States, or of the state. And for these purposes the said city council shall have authority by such ordinances—First, to license and regulate, among others, all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors."

The mode in which these powers are to be exercised is specified as follows in sections 8 and 9 of the same chapter: "The style of all ordinances shall be, 'The city council of the city of Minneapolis do ordain.' The subject of every ordinance shall be expressed in its title, and no ordinance shall embrace more than one subject. Section 9. All ordinances and resolutions of the city council shall be passed by an affirmative vote of a majority of all the members of the council by ayes and noes, which shall be entered on the records of the council. No ordinance shall be passed at the same meeting of the council at which it shall have been presented, except by unanimous consent of all the members present, which shall be noted in the record. When approved, they shall be recorded by the city clerk in books provided for that purpose; and before they shall be in force they shall be published in the official paper of the city."

[3] For discussion of principles, see Cooley, Mun. Corp. § 46.

[4] Part of the opinion is omitted.

Section 1 of chapter 3 provides that "all ordinances and resolutions shall, before they take effect, be presented to the mayor, and if he shall approve thereof he shall sign the same. If he returns it with objections, the council may pass it by a two-thirds vote; and if he retains it five days, it shall have the same force and effect as if approved by him."

On the 28th of April, 1884, the city council passed "An ordinance to license and regulate all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors;" section 1 of which reads: "No person shall sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors, or beverages, for any use or purpose whatever, in or at any building or other place within the limits of the city of Minneapolis, without having obtained a license therefor in the manner herein provided." Section 2 reads: "No person shall be licensed to sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors or beverages, for any use or purpose whatever, in or at any building or other place within the limits of the city of Minneapolis, * * * who intends, if licensed, to carry on his business, or who will, when licensed, carry on his business, outside of those districts in said city which shall hereafter be designated and known as 'active patrol districts,' to be designated as hereinafter required." Section 3 reads: "Any person desiring a license to sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors or beverages in said city of Minneapolis, shall make an affidavit and file the same with the city clerk of said city, in which affidavit said person shall state fully and explicitly * * * whether or not said room or rooms, where he intends to and will carry on his business if licensed, is within those districts in said city which have been duly designated as 'active patrol districts' of said city." Section 9 reads: "The mayor of said city shall designate such portions of said city as he shall deem best, to be known and designated as 'active patrol districts,' and shall submit the same to the city council for its approval; and, when approved by said city council, the same shall be and become the districts of said city, which shall be constantly patrolled by the police force of said city, under the instructions of said mayor. Said active patrol districts may be changed at any time by said mayor, by the like approval of said city council." The other provisions of the ordinance need not be here cited. After its passage and publication, the mayor, in pursuance of the provisions of section 9, designated certain portions of the city (embracing a district two or more miles in length, and of an average width of about half a mile, and including most of the business portion of the city) as "active patrol districts," and submitted the same to the council, which approved the same by resolution. * * *

We have no doubt whatever of the power of the city council to determine where, and within what portions of the city the business of selling and dealing in intoxicating liquors may be carried on. This right is implied and included in the power to regulate. And if they deem that the good order of the city requires that this traffic shall be excluded from the suburban and residence portions of the city, and confined to the more central and business portions, where it can be kept under more effectual police surveillance, their power to do so is, in our judgment, undoubted. Under a grant of police power to regulate, the right of the municipal authorities to determine where and within what limits a certain kind of business may be conducted, has been often sustained. For example, the place where markets might be held; where butchers' stalls or meat-shops may be kept; where hay or other produce shall be weighed; where auctions may be held; the limits within which certain kinds of animals shall not be kept; within which the business of tallow chandler shall not be carried on; within which gunpowder shall not be stored; within which slaughter-houses shall not be kept; the distance from a church within which liquor shall not be sold. Such cases might be multiplied almost indefinitely. If, under the general police power to regulate, this can be done as to such kinds of business, on what principle can it be claimed that similar regulations may not be adopted as to the sale of intoxicating liquors,—a traffic which all civilized communities deem necessary to place under special police regulations and restraints? Of course such regulations must be reasonable, of which fact the courts must judge. But, in assuming the right to do so, courts will not look closely into mere matters of judgment, and set up their own judgment against that of the municipal authorities, when there is a reasonable ground for a difference of opinion. But this power to regulate is vested in the city council. It is a power which they cannot delegate to any person or officer. It is a legislative act, which they must perform themselves, and they can only exercise it by ordinance, enacted in the manner prescribed in the charter. Of course, they may impose mere executive or ministerial duties, such as approving the bond, receiving the license fee, and issuing the license, on certain officers, as they have done in the present case. These are mere executive and ministerial acts to be performed in the execution of the ordinance; but they cannot delegate their legislative powers. The ordinance, in that respect, must be complete when it leaves the hands of the city council.

The limits within which the sale of liquor should be confined is a matter which the council must determine for themselves. It calls for the exercise of legislative discretion. They can no more remit to the mayor the right to determine this than they can the question of the

amount of the license fee. But this is, in effect, what they have done in this case.

The ordinance nowhere defines the limits of the "license districts." It leaves this to be done by the mayor, under the name of "active patrol districts," which is but another name for license districts. The matter is somewhat obscured by calling them "active patrol districts." But when the ordinance is stripped of all disguises, the stubborn fact remains that it is the judgment and discretion of the mayor, and not of the council, which is to determine in what parts of the city this business may be carried on. The difficulty is not obviated by the fact that the action of the mayor is to be approved by the council. This may be done by a mere resolution, passed by a bare majority of a quorum, at the same meeting at which it is introduced; whereas the council can only legislate on this subject by ordinance, passed in the manner prescribed by section 9, c. 4, of the charter already quoted. This ordinance carries with it the seeds of its own dissolution; for, under the last clause of section 9, the mayor might at any time, with the approval of a bare majority of a quorum of the council, extend the license district so as to include the whole city. In legislating upon this question, it is, of course, eminently proper that the council should take into account what parts of the city can conveniently be patrolled by the police; but, after all this, they must themselves exercise their legislative discretion in fixing the limits of the license district. * * *[5]

III. Meetings[6]

MAGNEAU v. CITY OF FREMONT.

(Supreme Court of Nebraska, 1890. 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436.)

NORVAL, J.[7] This suit was brought in the district court of Dodge county to enjoin the collection of certain occupation taxes imposed upon various occupations within the city by ordinance No. 231, and to have said ordinance declared void. The district court found the issue in favor of the defendants, and dismissed the action. The plaintiffs appeal. The city of Fremont is a city of the second class having over 5,000 inhabitants. It is divided into four wards, and, under the act or charter which governs cities of that class, is entitled to eight councilmen, two from each ward. At the general

[5] Writ of certiorari was denied in this case solely on the ground that it was not the proper remedy. See In re Wilson, post, p. 349.

[6] For discussion of principles, see Cooley, Mun. Corp. § 48.

[7] Part of the opinion is omitted.

election, held in said city on the 1st day of April, 1890, E. N. Morse was elected councilman from the Second ward as the successor to J. J. Lowery, and D. Hein was elected from the Third ward as the successor to C. A. Peterson. At a session of the city council held on April 3, 1890, the votes cast at the last city election were canvassed, and Morse and Hein were declared elected. This meeting was adjourned to April 4th, when the ordinance in question was introduced, and read the first time. An adjourned session was held on April 5th, when the ordinance was read a second time, and the meeting was adjourned to April 9th. On that date the council met, pursuant to adjournment, when the ordinance was read a third time, and passed. There was present and participated at this session, besides the mayor, councilmen Biles, Esmay, Plambeck, Harmes, Wilcox, Peterson, and Lowery. On April 7th, prior to the passage of this ordinance, the councilmen-elect Morse and Hein qualified. * * *

It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council except Peterson and Lowery, whose right to act is questioned on the ground that their successors had previously qualified on April 7th. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowery could not lawfully act with the council at that meeting, no quorum was present, and the ordinance is invalid. Section 12, art. 2, c. 14, Comp. St., provides that in cities of the second class having more than 5,000 inhabitants there shall be elected, annually, in each ward, one councilman, who shall hold his office for the term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control, and that the term of such officer commences immediately after the person elected has qualified. While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowery and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from any one, although Morse and Hein were, at the time, in the council chamber. We conclude, therefore, that Morse and Hein were de jure officers, and that Lowery and Peterson were de facto members of the city council.

The cases are numerous which hold that the acts of a de facto officer, so for as they involve the interests of the public, or third persons, are as valid and binding as though he was an officer de jure. * * * In State v. Gray, 23 Neb. 365, 36 N. W. 577, it was held that "the acts of councilmen de facto, within the power of the statute, will be recognized and upheld." In Braidy v. Theritt, 17 Kan. 468, the

defendant exercised the duties of councilman of the city of Watena after his successor had been elected and qualified. It was held that Theritt was a de facto officer. * * *

The following cases support the same doctrine: Norton v. Shelby Co., 118 U. S. 449, 6 Sup. Ct. 1121, 30 L. Ed. 178; Carli v. Rhener, 27 Minn. 292, 7 N. W. 139; Leach v. People, 122 Ill. 420, 12 N. E. 726; People v. Bangs, 24 Ill. 184; Trumbo v. People, 75 Ill. 561. It follows from the reason of these cases that the acts of Lowery and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted. * * *

It is also claimed that the city council had no authority to pass ordinance 231 at the meeting at which it was adopted. Ordinance No. 3, of the city of Fremont, provides that the regular meetings of the council shall be held on the last Tuesday of each month. It is conceded that the ordinance under consideration was not acted upon at such a meeting, nor at any adjourned session thereof. It is provided by ordinance No. 79 that the mayor and council shall meet on the Thursday following each city election, and canvass the returns of the votes cast at such election. A meeting was held April 3d, when the votes cast at the city election, held on April 1st, were canvassed. Prior to this meeting, a call was issued by the mayor for a meeting of the council on April 3d, to canvass the votes of the city election, and to transact any business that might lawfully come before the council. At the meeting held on April 3d, the mayor and all the members of the council were present, except Archer. This meeting was adjourned to the following day, at which time, the mayor and all the councilmen being present, the ordinance was introduced, read the first time, and the meeting adjourned to April 5th. On that date, there were present the mayor and all the councilmen except Plambeck. The ordinance was then read a second time, and an adjournment taken to April 9th. On the last-named date, all the members of the council being present, except Archer, the ordinance was read a third time, and passed.

The meeting held on April 3d was for the special purpose of canvassing the returns of the city election. Had it been a regular meeting, then any corporate business could have been lawfully transacted at any adjourned session thereof. The statute authorizes the mayor or any two councilmen to call special meetings. Whether the call must specify the object of such a meeting, the statute is silent, and the decisions of the courts are conflicting upon that question. At any rate, the purpose and object of the call is to apprise the members of the proposed meetings so that they may attend. So it seems clear to us that, when all the members of the council and the mayor meet and act as a body, they may at such meeting, or at any adjourned session thereof, transact any business within the powers conferred by law, notwithstanding no written call for the meeting was made by the mayor or two councilmen, or in case one was made which failed

to specify the purpose of the meeting. At the session held on April 4th, at which the ordinance was introduced and read, the mayor and all the members of the council were present and acted. All the members were notified of the meeting at which the ordinance was read the second time by the adjournment of the previous meeting, when all were present, and all had notice of the meeting at which the ordinance was passed by the adjournment of the meeting held on April 5th except Plambeck, and he was present and participated at the meeting when the ordinance was finally passed. In view of these facts, we must hold that the council was in lawful session when each step was taken when passing this ordinance. * * * Affirmed.

IV. Ordinances—Mode of Enactment [8]

SWINDELL v. STATE ex rel. MAXEY.

(Supreme Court of Indiana, 1895. 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.)

Mandamus, on the relation of James W. Maxey and another, against Joseph Swindell, mayor of the city of Plymouth, to compel respondent to recognize relators' claims to offices of councilmen. From a judgment for relators, respondent appeals.

JORDAN, J.[9] The relators, James W. Maxey and William O'Keefe, instituted and prosecuted this action in the lower court, in the name of the state, to obtain a writ of mandate against the appellant, as the mayor of the city of Plymouth, Marshall county, Ind., to compel him to recognize them, each, as members of the common council of the city, and permit them to each exercise the duties of the office of councilman. The application for the writ substantially sets forth that on April 25, 1873, Plymouth was incorporated as a city, under and in pursuance of the general laws of the state of Indiana applicable to the incorporation of cities; that the city upon its incorporation was divided into three wards, and that this division continued until the 27th day of August, 1894, when the common council thereof, being then composed of six councilmen, at a regular meeting, by an ordinance duly passed and adopted at said meeting, divided the city into four wards, thereby creating an additional one, which was designated as the "Fourth Ward"; that immediately after creating this ward said council at the said meeting did appoint the relators as councilmen therefrom, to fill the vacancies existing in said council by reason of the creation of the additional ward. The due qualification of the relators as members of the council is alleged, and

[8] For discussion of principles, see Cooley, Mun. Corp. §§ 49, 50.

[9] Part of the opinion is omitted.

it is charged that the mayor, as the presiding officer of the common council, has refused to recognize them, or either of them, and refuses to permit them, or either of them, to exercise their rights as such councilmen, and that he had directed the clerk not to call the names of said relators when present upon occasions when it was necessary to constitute a quorum, etc. * * *

The two cardinal propositions involved for a decision in this appeal are: First. Was the common council of the city of Plymouth authorized by law to adopt the ordinance whereby the additional ward was created, from which the relators were appointed as councilmen? Second. If the council was so empowered, was the ordinance in question legally and validly adopted? We will consider and determine these two questions in their order. * * *

The second proposition with which we are confronted is vital in its bearing upon the action of the council in passing the ordinance in controversy. The validity of the ordinance is essential or fundamental to the claims made by the relators. If for any reason it is invalid, the rights of the latter are unfounded, and the appellant would be justified in his refusal to recognize them as members of the council, and hence they must necessarily fail in the prosecution of this action. On May 26, 1873, the common council of the appellant's city duly passed and adopted an ordinance embracing a series of rules and regulations for the government of the common council in the transacting of its business, and as to the mode of proceeding in the enactment of ordinances. Some of these are merely rules of parliamentary law. Section 21 of this ordinance is as follows: "All ordinances shall be read three times before being passed, and no ordinance shall pass or be read the third time in the same meeting [that] it was introduced, provided that the council may suspend the rule by a two-thirds vote, and put an ordinance upon its passage by one reading at the time it is read." There is no question but what this rule was in full force and effect at the time of the introduction of the ordinance under consideration, and there is evidence showing that it had generally been recognized and followed by the council in the adoption of ordinances. It is the rule set up and relied upon by appellant in the second paragraph of his answer, in which it was, in substance, alleged that the ordinance upon which the relators based their claim and right to be recognized and to act as councilmen had been passed in violation thereof.

During the trial the court permitted the appellant to introduce this rule or ordinance in evidence, but subsequently, before the cause was finally submitted to the jury, upon the motion of appellees, the court struck out and withdrew this evidence, over appellant's objections and exceptions; and this action of the court was assigned as one of the reasons in the motion for a new trial. The trial court seemingly justified its action in eliminating this evidence upon the ground, as insisted by the relators, that this rule had been repealed, as the re-

sult of the motion made by Councilman Tibbetts, and carried in the manner as we have heretofore stated, and that the same was not in force when the ordinance in question was passed. The verbal motion made by this councilman, as recorded by the clerk, by which it was sought to effectually repeal the rules ordained for the government of the council, was, to say the least, somewhat indefinite. When recorded it read, *"That the rules heretofore governing the proceedings of council as printed in the ordinance book be and the same are hereby annulled and repealed."* (The italics are our own.)

Ordinances of cities are held to be in the nature and character of local laws adopted by a body vested with legislative authority, and coupled with the power to enforce obedience to its enactments. The power with which common councils of cities are invested to enact ordinances and by-laws implies the power to amend, change, or repeal them, provided that vested rights are not thereby impaired. But certainly it cannot be successfully asserted that the law will yield its sanction to the mode employed to repeal the one by which the rule in controversy was ordained and established. If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting, by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number, or date of passage of the ordinance or ordinances intended to be repealed.

In the case of Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261, it was held by this court that a defect in an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council, and put to a vote and carried. In Horr & B. Mun. Pol. Ord. § 61, it is said: "Express repeals can only be effected by an act of equal grade with that by which the ordinance was originally put in operation. No part or feature of an existing ordinance can be changed by a mere resolution of the council, even though signed by the mayor and recorded. A new ordinance must be passed." See, also, sections 63, 64, same authority. In Jones v. McAlpine, 64 Ala. 511, an attempt was made, by a motion, to raise or change the license fee in a certain ordinance by the mayor and board of aldermen of the city of Talladega. This method was held to be ineffectual in its results. The court said: "Until an ordinance had been adopted by the mayor and aldermen changing the ordinance of May 9, 1887, * * * that ordinance remained in full force, though there was an intention to change it, and a declaration of the will of the board that it should be changed."

Considered, then, in the light of the authorities which we have cited, and the manifest reason which necessarily underlies and sustains the rule which they assert, the conclusion is irresistibly reached that the attempt to repeal the ordinance which embraced the series of rules and

regulations in question, by the action of the council in adopting the motion in controversy, was ineffectual, and did not result in the repeal or abrogation of the rule under consideration. Having reached this conclusion, the inquiry arises as to the effect of the operation of this rule upon the ordinance upon which the relators found their claims, and which was passed and adopted, as it appears, by the council, in violation of its provisions.

It is said in Dill. Mun. Corp. § 2888: "After a meeting of the council is duly convened, the mode of proceeding is regulated by the charter or constituent act, or by ordinances passed for that purpose, and by the general rules, so far as in their nature are applicable, which govern other deliberative and legislative bodies." In section 47, Horr & B. Mun. Pol. Ord., it is said: "The usual statutory direction is that every ordinance shall be read at three different meetings before its final enactment. The direction is necessary, as a safeguard against too hasty legislation, and its observance mandatory. If neglected, the ordinance is ab initio void." In Beach, Pub. Corp. § 494, it is said: "The mode of enacting the ordinance is generally prescribed in the charter or an ordinance, and their requirements should be strictly complied with. So, where the charter prescribes that no by-law shall be passed unless introduced at a previous meeting, the provision has been held to be mandatory, and a by-law passed in violation thereof is void."

In the case of Horner v. Rowley, 51 Iowa, 620, 2 N. W. 436, the question arose as to the validity of a town ordinance authorizing the issuance of a license for the sale of wine and beer. It appeared that the council that adopted the ordinance involved in that case consisted of seven members. The statute of the state provided "that ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rules." Upon a motion to dispense with the reading required under the rule, four members voted in the affirmative, and none in the negative. The mayor decided the motion carried, and the ordinance was adopted. The court said: "As four, the number who voted to suspend the rule and pass the ordinance, is not three-fourths of seven, it follows that the ordinance was not legally enacted. It was therefore void, and no valid act could be done under its provisions." The statutes of Ohio relating to cities require that ordinances of a permanent nature shall be read on three different days, unless three-fourths of the members of the council dispense with the rule. In the appeal of Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606, it was held that this provision was mandatory, and that, in passing several ordinances "in a lump," it was requisite to suspend the rule as to each, in order to render its final adoption legal and valid. * * *

The rule, therefore, as stated in numerous adjudged cases, is that the mode of procedure to be followed in the enactment of ordinances,

as prescribed by statute, must be strictly observed. Such statutory powers constitute conditions precedent, and, unless the ordinance is adopted in compliance with the conditions and directions thus prescribed, it will have no force. 17 Am. & Eng. Enc. Law, 238, and cases cited. In Clark v. Crane, 5 Mich. 151, 71 Am. Dec. 776, the supreme court laid down the rule that 'what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as merely directory.' The requirement that ordinances * * * shall be fully and distinctly read upon three different days is designed as a safeguard against rash and inconsiderate legislation; and, being in a great degree essential to the protection of the rights of property, it should be deemed a mandatory measure, intended as a security for the citizen." The case of State v. Priester, 43 Minn. 373, 45 N. W. 712, asserts the same rule, and the reasons therefor. This court, in the appeal of the City of Logansport v. Crockett, 64 Ind. 319, held that section 3534, Rev. St. 1894 (section 3099, Rev. St. 1881), which requires that on the adoption or passage of any by-laws, ordinances, or resolutions, the yeas and nays shall be taken and entered on the record, was mandatory, and that a noncompliance with this provision rendered the adoption of the ordinance nugatory. See Dill. Mun. Corp. § 291.

It is not necessary that we should further extend the consideration of the question, or refer to additional authorities to show that, when the legally prescribed method of procedure in the enactment of an ordinance is neglected or violated, the latter is thereby rendered invalid and of no force or effect. This doctrine or principle seems to be firmly settled by many leading authorities and decisions. The inquiry then is: Is the same principle applicable when the procedure is one prescribed by an ordinance of the common council enacted under the exercise of the power granted by the legislature? There is no statute in this state that embraces or contains the provisions or requirements in regard to the passage of an ordinance by the common council that are contained in section 21 of the ordinance in question. This right to regulate such proceedings in this particular respect seems to have been committed by the legislature to the common council. Section 3533, Rev. St. 1894 (section 3098, Rev. St. 1881), among other things, provides that "the common council may by ordinance prescribe such rules and regulations, in addition to those herein contained, for the qualification and official conduct of all city officers, as they may deem for the public good, and which shall not be inconsistent with the provisions of this act." By section 3616, Rev. St. 1894 (section 3155, Rev. St. 1881), it is further provided, in addition to the powers expressly granted, that the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation, etc. By these provisions, plenary powers are given to the council to pass and adopt ordinances prescribing rules

and regulations, not inconsistent with law for its government and control, when duly convened and acting officially, in regard to its proceedings upon the passage of an ordinance or otherwise.

We have seen, by some of the leading authorities which we have herein cited, that when the mode of proceeding upon the part of the council in the adoption of an ordinance is regulated either by the charter, or an ordinance enacted thereunder, this prescribed mode must be strictly followed. Ordinances of a city, duly enacted, are in the nature of laws; being the decree or will of the common council, which body is vested with legislative authority. Public policy demands and authority sanctions the delegation of various powers of local legislation to this municipal body. The ordinances enacted in the exercise of these powers have, within the corporate limits of the city, the force of laws. They are held by the courts to be, within these limits, as binding as the laws of the state and general government, and are enforced in a similar manner, and under like rules of construction. When an ordinance is duly and legally passed, under the warrant of the legislature, it is in force, by the authority of the state. Horr & B. Mun. Pol. Ord. § 2; Beach, Pub. Corp. §§ 482, 486. A by-law or ordinance which a municipal corporation is authorized to adopt is as binding on its members and officers, and all other persons within its limits, as a statute of the legislature. Heland v. City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136, and authorities cited; Tied. Mun. Corp. § 153; Dill. Mun. Corp. §§ 307, 308. In Milne v. Davidson, 5 Mart. N. S. (La.) 586, 16 Am. Dec. 189, a contract entered into in contravention of an ordinance of the city of New Orleans was held to be void. The court said: "The ordinances of a corporation, while acting within the powers conferred upon them by the legislature, have as binding an effect on the particular members of that corporation as the acts of the general assembly have on the citizens throughout the state, and it is as much a breach of duty to evade or violate the one as it would be to evade or violate the other. The moral and legal obligation to obey them is the same, and the consequences of nonobedience ought to be the same."

These many authorities, which substantially enunciate and sustain the proposition that a municipal ordinance is a local law or statute, upon which rests both the moral and legal obligation to obey of all persons subject thereto, and that the results of a noncompliance with the mandatory or prohibitory provisions thereof must, in reason, be the same, in effect, as follow the disobedience or disregard of an act of the legislature of like import, warrant the conclusion and holding that when the charter law of a city does not regulate the mode of procedure to be observed upon the adoption of an ordinance by the council, but has committed the authority or power so to do to that body, which, in pursuance thereof, has prescribed by ordinance an

essential and salutary rule, mandatory and prohibitory in its provisions, as is the one under consideration, the council must yield to it their obedience, and, in the enactment of an ordinance, must be controlled thereby, unless suspended in the manner or by the vote provided, and that the consequences of refusing to substantially comply with its provisions, or a violation of its inhibition, must, in reason, be the same as the noncompliance with or a violation of a requirement prescribed by the statute. The section of the ordinance in question prescribed, substantially, that "all ordinances shall be read three times before being passed. No ordinance shall pass or be read the third time at the same meeting in which it was introduced." The word "all" may mean "every," and is to be construed in this connection. Bloom v. Xenia, 32 Ohio St. 461. We may therefore read the rule thus: "Every ordinance shall be read," etc. The first clause is mandatory, and the second prohibitory.

Such a rule prescribed for the government of legislative bodies is recognized by the courts as a salutary one. It is a check upon what sometimes might prove to be ill-advised, prematurely considered, or pernicious legislation. If a common council were permitted to willfully ignore, utterly disobey, and violate an ordained rule of this character, injurious results to the inhabitants of the corporation might, and possibly would, result. It is therefore the duty of courts to require a strict compliance with mandatory provisions of the law, of the character and purpose of the one in question. A two-thirds vote of the council was required, to suspend the rule. This, in reason at least, must be construed and held to mean not less than two-thirds of all the members present at any meeting of the council. Atkins v. Phillips, 26 Fla. 281, 8 South. 429, 10 L. R. A. 158. It appears from the record that the acts of the council antecedent to and including the final passage of the ordinance creating the ward in controversy only received the votes of, and were sanctioned by, three of the six councilmen present at the meeting. Three cannot be held to be two-thirds of six. Hence, in no manner, or upon any view of the case, was a suspension of the rule effected.

Viewed then, in the light of the reason and logic of the authorities herein cited, we are constrained to hold and adjudge that, the ordinance having been passed in noncompliance with and in violation of the ordained rule in controversy, it is invalid and inoperative, and that the action of the council based thereon, in appointing the relators, is likewise void, and consequently the latter cannot successfully maintain this action. City of Logansport v. Legg, 20 Ind. 315. * * * Reversed.

V. Essentials of Valid Ordinance [10]

1. Must Not Be Oppressive

CITY OF CHICAGO v. GUNNING SYSTEM.

(Supreme Court of Illinois, 1905. 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230.)

Bill by the Gunning System against the city of Chicago, by which it is sought to have declared void two ordinances of the city of Chicago relating to billboards and for an injunction. From a decree for complainant, which was affirmed by the Appellate Court (114 Ill. App. 377), defendant appeals.

Wilkin, J.[11] * * * It is claimed by appellee that under clause 17 of section 1, art. 5, of the city and village act (Hurd's Rev. St. 1899, c. 24), the city can regulate and prevent the use of signs on the streets and public places of the city; that this is a specific provision relating to signs; and that the power thus expressly granted cannot be added to by the general language found elsewhere in the act, and that there is no authority conferred by statute upon municipalities to regulate billboards erected upon private property. We cannot agree with this contention, but are of the opinion that there is ample power, under paragraphs 66 and 75 of section 1, art. 5, of the city and village act (Hurd's Rev. St. 1899, p. 277, c. 24), to authorize municipalities to pass reasonable ordinances covering said subject. Paragraph 66 confers upon cities power "to regulate the police of the city or village and pass and enforce all necessary police ordinances." * * * Paragraph 75, supra, gives cities and villages power "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." * * * We think it clear that either under paragraph 66 or 75, supra, full power and authority are conferred upon cities, towns, and villages to regulate the construction and use of billboards within their corporate limits, provided the regulation is not unreasonable. Moreover, paragraph 78 of section 1, art. 5, confers upon cities and villages the right "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." No argument need be advanced that the structures described in the bill before us may become a menace to the safety of the public, and hence the subject of control and regulation. They may be erected in such a manner as to be dangerous to the public by falling or being blown down, or constructed of such materials and

[10] For discussion of principles, see Cooley, Mun. Corp. § 51.

[11] Part of the opinion is omitted and the statement of facts is rewritten.

dimensions as to be dangerous, or placed upon buildings or other structures in such a manner as to endanger the life and limb of the citizen, or erected within the fire limits in such proximity to buildings as to increase the danger of loss by fire, or so as to obstruct the view of railroad crossings, and thus endanger life by accident, or have printed or displayed upon them obscene characters tending to demoralize and injure the public morals. If boards are erected in violation of any of these public rights or interests, and of others which might be mentioned, there is ample power within the statute to regulate them, provided such regulations are reasonably necessary for the protection of the public health, morals, or safety. Nor will the mere fact that such structures are placed upon private property, and not on the public streets, protect those owning or using them against such reasonable regulations. The police power invades individual rights and property whenever private individuals, by the use of their private rights or private property, injure the public in any of the above-mentioned ways. The one essential and universal limitation upon the exercise of the police power is, however, that the regulation shall be reasonably necessary and reasonably exercised.

The question therefore remains to be considered whether the municipal authorities have in this case reasonably exercised the power vested in them; in other words, whether the ordinance of June 29, 1900 (the only one here in question), is reasonable. The first four sections of the ordinance relate to signs and billboards to be thereafter erected. Section 1 provides that they shall be constructed of sheet or galvanized iron, or some equally noncombustible material, shall not exceed 100 square feet in area, and shall not be located nearer than 25 feet back of the front line of the lot. Section 2 provides that they shall not exceed 10 feet in height above the level of the adjoining streets, and the base shall be at least 3 feet above the level of the street, and in case the grade of adjoining streets has not been established they shall not exceed 10 feet above the surface of the ground. Section 3 provides that one board shall not be erected within five feet of any other board, and that each shall have independent supports. All of these provisions are general in their terms, and apply alike to boards erected in every part of the city.

In a great city like Chicago the court will take judicial notice that billboards are of various kinds, generally made out of a variety of materials, and erected in many different localities; some in the thickly settled and business districts, where the erection of wooden buildings may properly be prohibited, or in the vicinity of electric wires, where more stringent regulations are reasonably necessary to protect the public safety; or they may be in the remote and more thinly settled territory of the city, where such stringent precautions are not necessary, while others may be on vacant tracts of land far removed from other structures of every kind. It must be apparent to all reasonable minds that provisions which are necessary in one of such

cases would be wholly unnecessary and unreasonable in the others, and that a provision might be a reasonable police regulation in the one case and in one locality which would be wholly unreasonable under other circumstances in another locality. This ordinance is, however, without qualification or limitation, applicable to signs and billboards alike in all portions of the great city of Chicago; applicable alike to every portion of its extended territory. We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city. Nor do we question the doctrine announced in City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311, and other cases, holding that, "where the municipal authorities are acting within their well-recognized powers, or are exercising a discretionary power, a court of equity has no jurisdiction to interfere unless the power or discretion is being manifestly abused to the oppression of the citizen." Where, however, as here, the attempt is to prohibit the owner of a lot in a remote, sparsely settled part of the city, or his lessee, from erecting a sign or billboard thereon except of required material—"sheet or galvanized iron," etc.—we think it does become unreasonable and oppressive.

Section 4 provides that no sign or billboard shall be erected upon any boulevard or pleasure drive, or in any street where three-fourths of the buildings in such street are devoted to residence purposes, without the consent, in writing, of at least three-fourths of the residents and property owners on both sides of the street in the block where it is desired to erect such board. There is no evidence in the record upon which to base the reasonableness of this provision. It seems to be an arbitrary restriction on the part of the city, depriving an individual property owner of the use of his property as he may choose, without any showing that such use would be injurious to others in the same vicinity. On the evidence before us that section must be held unreasonable and void.

Section 5 provides that all signs and billboards erected before the passage of the ordinance which shall exceed 100 square feet in area or are of a greater height than 10 feet above the surface of the ground shall pay an annual license of 50 cents per square foot, and in default of such payment shall be torn down. The evidence shows that under this section appellee would be required to pay to the city $210,000 per year, while its gross income is but $120,000 per year. All of these signs and billboards upon which this license would have to be paid were erected by appellee under the ordinances of the city as they existed at the time they were built, and the city, in some instances, received a license fee for the privilege of erecting the same. This provision of the ordinance is not only unreasonable in its terms, but is prohibitive of appellee's business, and, if enforced, appellee would be required to pay more than one and one-half times the amount of its gross income, or have its property destroyed. An ordi-

nance which is unreasonable, unjust, and oppressive will be held by the courts to be void. Hawes v. City of Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225.

The purpose of sections 4 and 5 seems to be mainly sentimental, and to prevent sights which may be offensive to the æsthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards. The extreme restrictions placed on the erection and maintenance of such boards, and the license fee placed thereon, indicate that these sections were intended to be prohibitive, rather than regulative, and are, in our judgment, unreasonable.

Our conclusion therefore is that the decree of the superior court was right, and properly affirmed by the Appellate Court, not for want of power in the city council of the city of Chicago to pass an ordinance reasonably regulating the erection and maintenance of billboards, but because, under the allegations of the bill and the proofs made by complainant below, the ordinance here in question is unreasonable. Decree affirmed.

---

2. Must Not Contravene A Common Right

STATE v. RAY.

(Supreme Court of North Carolina, 1902. 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634, 92 Am. St. Rep. 795.)

J. D. Ray was convicted of violating an ordinance, and appeals.

Furches, C. J. The defendant is the owner of a dry goods and grocery store (not of liquors) in the town of Scotland Neck, Halifax county. Scotland Neck is an incorporated town, and on the 4th of July, 1902, the commissioners of said town passed this ordinance: "It shall be unlawful for barrooms, groceries, dry goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to keep open later than 7:30 o'clock p. m. except Saturdays. Any one violating this ordinance shall be fined five dollars for each and every violation." The defendant admits that he is the owner of a dry goods and grocery store in the town of Scotland Neck, and that he has kept it open later than 7:30 p. m. since the 7th day of July, 1902, the date at which said ordinance was to go into effect, but pleads "Not guilty," and a special verdict was returned, finding the facts as above.

It is admitted that the charter of said town gives no special authority for the passage of such an ordinance, and that the commissioners had no authority for the passage of said ordinance, except the general powers incident to municipal corporations. This presents squarely the question of corporate power to pass and enforce such an ordinance

without any legislative authority to do so, except the fact that it is a chartered municipality. It is therefore not necessary that we should discuss the power of the legislature to pass such an act, or to authorize a municipality to pass such an ordinance, and we do not enter into the consideration of that matter.

It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right,—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested, that defendant's keeping his store open after 7:30 interfered with the rights of any one else. It was said that the other merchants in Scotland Neck were willing to close their stores at 7:30, but the defendant was not, and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so, or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant's store?

It would seem that no legislative power exists, under our form of government and our ideas of personal liberty, as to allow such interference with one's rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the public. When such interference is authorized, it is under the doctrine of eminent domain, or what is known as the "police power of the government." The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police power of the government. If the state could exercise such power (and we do not say it could), can a municipal corporation do so without express authority from the state? The general rule is that a municipal corporation can only exercise such powers as are expressly given in its charter, or such as are necessarily implied by those expressly given. This doctrine is well expressed by 1 Dill. Mun. Corp. § 89, which is copied by Justice Avery in State v. Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920, and is approved and adopted by this court in that case: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the exercise is resolved by the courts against the corporation, and the power is denied.

The same doctrine is probably more pointedly stated, as applicable to the case now under consideration, in State v. Thomas, 118 N. C. 1221, 24 S. E. 535, as follows: "An ordinance, says Dillon (1 Mun. Corp. § 325), cannot legally be made, which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such rights, au-

thority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit. If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in section 3799 of the Code, to give them equal authority with the legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given to the statute, and its attempted exercise was therefore unlawful." It seems to us that these authorities settle the question, and plainly show that this ordinance was unlawful and cannot be enforced.

It is said that towns are constantly exercising such power over barrooms where liquors are sold. This power, so far as our investigation goes, is expressly given in the charters. But if there is any case where it is not, it must be understood that it stands on a very different footing to the sale of dry goods and family groceries. Liquor itself is regarded as an evil,—an enemy of civilization and of good government. Bailey v. City of Raleigh, 130 N. C. 209, 41 S. E. 281, 58 L. R. A. 178; State v. Barringer, 110 N. C. 525, 14 S. E. 781. Its sale without a license is condemned and prohibited by law, and the regulations closing such shops might well be put upon the implied power, as being for the public good. But however that may be, that is not the question before the court, and what has been said to the sale of liquors has only been said to meet an argument of the state.

It is also said that the state of California has exercised such power without express legislation, and that the supreme court of the United States affirmed the judgment of the California court. But when those cases are examined, it will be found that they were cases where the business of ironing was carried on all night in a thickly settled portion of the city of San Francisco, consisting of old wooden buildings near the Sound, where the wind usually blew hard, which made it very dangerous to carry on such work at late hours of the night, on account of fire. And the opinions rest upon the ground that it was for the public good—the protection of the public from the danger of fire—that the city was allowed to prevent such persons from carrying on such work at such late hours of the night. But the supreme court of the United States only affirmed the ruling of the state court, which is the rule of that court where there is no federal question involved. So it amounts to no more than a decision of the supreme court of California against the repeated decisions of our own supreme court. And were we to admit that the distinction does not exist between the California case and this case, which we have pointed out, the question then is, shall we adhere to our own decisions, when we are not able to see any error in them, or shall be adopt the opinion of the court of

California? We prefer to follow our own decisions, and are of the opinion that the corporate authorities of Scotland Neck were not authorized to pass the ordinance under consideration, and it is void.

There is error, and under the special verdict the defendant was entitled to an acquittal and discharge. The judgment of the court below is reversed.[12]

---

3. Must Not Be Unreasonable

STATE v. DERING.

In re GARRABAD.

(Supreme Court of Wisconsin, 1893. 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948.)

This is a proceeding by certiorari to review the decision of C. L. Dering, court commissioner, in the matter of his refusal to discharge the petitioner, Joseph Garrabad, from custody, and remanding him to the imprisonment of which he complains. It appears from the return of the sheriff to the writ of habeas corpus issued by the commissioner that on the 27th day of February, 1893, the petitioner was placed in his custody, and was held therein, under and by virtue of an execution or so-called "commitment," reciting that the city of Portage had recovered a judgment before said justice against the petitioner for the sum of $5, together with $13.85 costs of suit, for the violation of an ordinance of said city. The ordinance in question provides that "it shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to march or parade over or upon" certain streets (therein named) in the city of Portage, "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet, without first having obtained a permission to so march or parade, signed by the mayor of said city: * * * Provided, that this section shall not apply to funerals, fire companies, nor regularly organized companies of the state militia: and provided, further, that permission to march or parade shall at no time be refused to any political party having a regular state organization." The petitioner demurred to the return, and the commissioner overruled the demurrer, and ordered that he be remanded to the custody of the sheriff, to be confined in the county jail of said county, according to the terms of said execution.[13]

[12] The dissenting opinion of Clark, J., is omitted.

[13] The statement of facts is rewritten.

PINNEY, J. The city charter of the city of Portage (Laws 1882, c. 132, § 31) confers upon the common council of the city power to pass ordinances and by-laws on certain subjects, under and by virtue of the delegation of the police powers of the state to the common council and city officers for the government of the city, and the preservation of order and public safety. In respect to such ordinances or by-laws it has long been the established doctrine that they must be reasonable, not inconsistent with the charter nor with any statute, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Dill. Mun. Corp. § 319, and cases cited in notes. The particular objections urged to the validity of the ordinance in question fall within the scope of the fourteenth amendment to the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These provisions apply equally to all persons within the territorial jurisdiction of the United States, without regard to any differences of color or nationality; and the equal protection of the laws is a pledge, it is held, "of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 369, 6 Sup. Ct. 1064, 30 L. Ed. 220.

It is objected that the ordinance is void on its face, by reason of its operating unequally and creating an unjust and illegal discrimination, not only (1) by the express terms of the ordinance itself, but (2) it is so framed as to punish the petitioner for what is permitted to others as lawful, without any distinction of circumstances, whereby an unjust and illegal discrimination occurs in its execution, and which, though not made by the ordinance in express terms, is made possible by it; (3) in that it vests in the mayor, or other officers of the city named in it, power to arbitrarily deny persons and other societies or organizations the right secured by it to others to march and parade on the streets named. The general subject and scope of the ordinance is marching or parading by "any person or persons, society, association, or organization" over the streets named, "shouting, singing, or beating drums or tambourines, or playing upon any musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet," without having obtained permission as prescribed in the ordinance. It provides, among other things, that the ordinance shall not apply to fire companies, nor to regularly organized companies of the state militia, and that permission to march or parade shall at no time be refused to any political party having a regular state organization. The permission, it will be seen, is required absolutely to be granted to political parties having a regular state organization, so they are practically excepted out of the ordinance.

Whether permission shall be granted to any other society, civic, religious, or otherwise, depends, not upon the character of the organization, or upon the particular circumstances of the case, but upon the arbitrary discretion of the mayor or other officers named in the ordinance, acting in his absence.

It is therefore argued that, as between different persons, societies, associations, or organizations, the ordinance operates unequally, and creates unjust and illegal discriminations by its express terms, and makes such discriminations not only possible, but necessary in its administration, and therefore that the ordinance is void upon common-law principles, as heretofore recognized and administered in the courts of the country. The rights of persons, societies, and organizations to parade and have processions on the streets with music, banners, songs, and shouting, is a well-established right, and, indeed, the ordinance upon its face recognizes to a certain extent the legality of such processions and parades, and provides for permitting them, in the discretion of the mayor, in all cases except those named, and as to those the right is practically secured. The ordinance, as framed, and as it is to be executed under the arbitrary discretion of the mayor or other officer, is clearly an abridgment of the rights of the people; and in many cases it practically prevents those public demonstrations that are the most natural product of common aims and kindred purposes. "It discourages united effort to attract public attention and challenge public examination and criticism by associated purposes."

Anderson v. City of Wellington, 40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. Rep. 175, contains a careful discussion and examination of a similar ordinance, which was there held to be void as contravening common right. In Re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310, after full discussion by Campbell, C. J., a similar ordinance was also held void, and that it is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers; that charters, laws, and regulations, to be valid, must be capable of construction, and must be construed, in conformity to constitutional principles, and in harmony with the general laws of the land; and that any by-law which violates any of the recognized principles of lawful and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms; and no grant of absolute discretion to suppress lawful action can be sustained at all; that it is a fundamental condition of all liberty, and necessary to civil society, that men must exercise their rights in harmony with, and yield to such restrictions as are necessary to produce, peace and good order; and it is not competent to make any exceptions for or against the so-called "Salvation Army" because of its theories concerning practical work; that in law it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar

means for drawing attention or creating interest. Hence the by-law there in question, because it suppressed what was in general perfectly lawful, and left the power of permitting or restraining processions and their courses to an unlawful official discretion, was held void; and that any regulation, to be valid, must be by permanent legal provisions, operating generally and impartially.

The return of the sheriff utterly fails to show of what specific offense the petitioner was convicted; that is to say, in what particular respect he violated the ordinance. We may infer, however, for the purpose of argument and illustration, from the fact that the petition for the writ addressed to this court states that the petitioner is a member of the Salvation Army, that he was convicted of parading the streets in that capacity. It cannot be maintained that any person or persons or society have any right for religious purposes or as religious bodies to use the streets for purposes of public parade because the purpose in view is purely religious, and not secular, but they certainly have the same right to equal protection of the laws as secular organizations. The objections urged against this ordinance are, we think, fatal to any conviction which might take place under it by reason of its unreasonable and unjust discriminations, and of the arbitrary power conferred upon the mayor or other officer of the city to make others in its administration and execution; so that it is impossible to sustain the conviction in any aspect in which the question may be viewed.

A careful examination of the decisions in various states, and the considerations upon which they are founded, is not material to the determination of the case, for the whole subject is governed and controlled by the provisions of the fourteenth amendment to the constitution of the United States, already referred to. In construing and applying this amendment, the supreme court of the United States have said in Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, that it "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application if within the sphere

of its operation it affects alike all persons similarly situated, is not within the amendment."

The entire subject underwent careful examination in the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, where the subject of city ordinances and the principles regulating their validity were considered. The objections to the validity of the ordinances in that case were, in substance, the same that are urged in this, and the ordinances in question were held void. The objections urged in the case of City of Baltimore v. Radecke, 49 Md. 217, were also, in substance, the same, for the ordinance in that case upon its face committed to the unrestrained will of a single public officer the power to determine the rights of parties under it, when there was nothing in the ordinance to guide or control his action, and it was held void because "it lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented," and that "when we remember that action or nonaction may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

The doctrine of this case was approved in Yick Wo v. Hopkins, supra, and the court in the latter case observed: "We are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration;" and proceeded to show that in the case there presented the ordinances in actual operation established "an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they were applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States;" and the court added: "Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Nearly all the processions, parades, etc., that ordinarily occur are excepted from the ordinance in question, followed by a provision that permission to march or parade shall at no time "be refused to any political party having a regular state organization." It is difficult to see how this can be considered municipal legislation, dictated by a fair and equal mind, which takes care to protect and provide for the parades and processions with trumpets, drums, banners, and all the accompaniments of political turnouts and processions, and at the same time provides, in effect, that the Salvation Army, or a Sunday school, or a temperance organization with music, banners, and devices, or a lodge of Odd Fellows or Masons, shall not in like manner parade or march in procession on the streets named without getting permission of the mayor, and that it shall rest within the arbitrary, uncontrolled discretion of this officer whether they shall have it at all. The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practicing against and upon persons, societies, and organizations a petty tyranny, the result of prejudice, bigotry, and intolerance, than any fair and legitimate provision in the exercise of the police power of the state to protect the public peace and safety. It is entirely un-American, and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights.

In the exercise of the police power, the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies, or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may be arbitrarily practiced to the hurt, prejudice, or annoyance of any. An ordinance which expressly secures to political parties having state organizations the absolute right to street parades and processions, with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting and songs, in support of any laudable or lawful

cause, subject to the power of any public officer to interdict or prevent them. Our government is "a government of laws, and not of men," and these principles, well established by the courts, by the fourteenth amendment to the constitution of the United States, have become a part of the supreme law of the land, so that no officer, body, or lawful authority can "deny to any person the equal protection of the laws."

It is plain that the ordinance in question is illegal and void, and for this reason the order of the commissioner must be reversed. The order of the court commissioner is reversed, and the petitioner ordered discharged.

PEOPLE v. ARMSTRONG.

(Supreme Court of Michigan, 1889. 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578.)

LONG, J. This case comes from the recorder's court of the city of Detroit by writ of certiorari. The complaint is made under section 12, c. 55, Rev. Ordinances City of Detroit, as amended August 22, 1885, and charges that at the city of Detroit on the 18th day of June, 1888, within the corporate limits of said city, on Woodward avenue, at the corner of Grand River avenue, the defendant, John Armstrong, then and there unlawfully and willfully did circulate and distribute and give away circulars, hand-bills, and advertising cards, to the evil example of all others in like cases offending, and contrary to the ordinance of said city, etc. The conceded facts proven on the trial are that defendant was distributing cards on the corners of Woodward and Grand River avenues, in the city of Detroit, on the evening of June 18, 1888; that defendant is one of the invitation committee referred to in the cards; that no cards were to be seen upon the ground or sidewalk at or near the place of distributing the same; that cards were given to those only who expressed or appeared to desire the same, and took the same willingly; that the use of the Y. M. C. A. privileges offered by the cards was entirely gratuitous; that cards were offered persons unknown to defendant. The cards were in the following form and size:

THE INVITATION COMMITTEE INVITES CORDIALLY YOU

TO SPEND

THIS OR ANY MONDAY NIGHT,

From 7:45 to 9 o'clock,

AT THE Y. M. C. A. BUILDING.

ICE WATER AND FANS.

The provision of the charter of the city of Detroit, under which it is claimed the city had power to pass the ordinance under which the complaint is made, reads: "That the council shall have power to provide for cleaning of highways, streets, avenues, drains, alleys," etc., "of dirt, filth and other substances; * * *" also "to prohibit and prevent the incumbering or obstructing of streets, drains, alleys, cross-walks, sidewalks, and all public grounds and places, with vehicles, animals, boxes, signs, barrels, posts, buildings, dirt, stone, brick, and all other material and things whatsoever, of every kind and nature; * * *" also "to control, prescribe, and regulate the manner in which highways, streets, avenues, lanes, alleys, public grounds, and spaces in said city shall be used and enjoyed; * * *" also "to prohibit and prevent the flying of kites, and all practices, amusements, and doings therein having a tendency to frighten teams and horses."

The ordinance under which the complaint is made reads: "Sec. 12. Hereafter no person shall himself, or by another party, attach, place, print, paint, or stamp any placard, circular, show-bill, or advertisements, of any description whatever, except such as may be expressly provided by law, on any street or sidewalk, or upon any public place or object, in the city, or upon any fence, building, or property belonging to the city, or upon any telegraph pole, telephone pole, electric light pole or tower, or upon any hitching-post, horse-block, or curb-stone, in any public street or alley in the city of Detroit, and no person shall himself or by another circulate, distribute, or give away circulars, hand-bills, or advertising cards of any description in or upon any of the public streets and alleys of said city."

On the trial of the case, defendant's attorney asked for the discharge of the defendant, which the court overruled, and found the defendant guilty, and imposed a fine of three dollars, in default of payment of which fine defendant was ordered to be imprisoned in the Detroit house of correction for a period not exceeding 20 days. The said fine was imposed under authority of section 19, c. 55, of the ordinance, which reads: "Sec. 19. Any violation of the provisions of this ordinance shall be punished by a fine not to exceed one hundred dollars, and costs of prosecution; and in the imposition of any fine and costs the court may make a further sentence that the offender may be imprisoned in the Wayne county jail or the Detroit house of correction until the payment thereof: provided, however, that the period of such imprisonment shall not exceed six months."

The allegations of error contained in the affidavit for the writ of certiorari are: That the ordinance upon which this complaint is based is invalid, in that the common council had no authority under the charter of the city to adopt the same; that the ordinance is invalid, because unreasonable, oppressive, and in contravention of constitutional rights; that the court had no authority to impose any fine or penalty, because the ordinance under which the penalty is

claimed to be imposed is unconstitutional, in that it permits and authorizes the imposition of fines and penalties excessive and unreasonable and entirely disproportionate to offenses created and specified; that the court had no authority to impose a penalty, and the judgment is void because the ordinance under which the penalty imposed is claimed to be authorized is illegal, in that it provides for variable and uncertain penalties for offenses charged; that the defendant should have been discharged.

Corporations derive all their powers from legislative acts, and they can pass no ordinance which conflicts with the charter. Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done will not be set aside by the courts, unless in conflict with the constitution, because they may deem it unreasonable. But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. 1 Dill. Mun. Corp. § 262. The fact, however, that an ordinance covers matters which the city has no power to control is no reason why it should not be enforced as to those which it may control. The unauthorized provisions do not invalidate the whole ordinance, if they can be separated from the rest of the ordinance without so mutilating it as to render it inoperative. Kettering v. Jacksonville, 50 Ill. 39.

It is insisted upon the part of the prosecution that the power contained in the charter is sufficient to warrant the passage of the ordinance. There is an express power in the charter to provide for cleaning the highways, streets, avenues, lanes, alleys, public grounds, and squares, cross-walks, and sidewalks, in said city, of dirt, mud, filth and other substance; also to prevent the incumbering or obstructing of streets, lanes, alleys, etc., and to control, prescribe, and regulate the manner in which the highways, streets, etc., shall be used and enjoyed, as well as to prohibit and prevent the flying of kites, and all practices, amusements, and doings therein having a tendency to frighten teams and horses, or dangerous to life or property. This is not an express grant of power to the city of Detroit to pass a by-law or ordinance to prohibit a person from circulating, distributing, or giving away circulars, hand-bills, or advertising cards of any description, in or upon any of the public streets and alleys of said city, and to punish by fine and imprisonment in the county jail or the Detroit house of correction for violation, and there is no such power implied in these provisions of the charter.

Even if it could be held that the charter authorized it, this part of the ordinance is not a reasonable exercise of the power granted. It is true that the miscellaneous throwing to the winds of hand-bills, circulars, or advertising cards may be an act that would be very desirable to prohibit. Such a distribution of cards or paper of any kind would not only litter up the street, and become a nuisance upon and along the streets, sidewalks, and cross-walks, but naturally would tend to frighten teams and horses hitched upon or being driven along the streets, and great danger might be apprehended to life and limb; yet the reasonableness or unreasonableness of an ordinance is not determined by the enormity of some offense it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder. It is conceded in the present case that these cards were given to those only who expressed, or appeared to express, a desire for the same, and that no cards were to be seen upon the ground or sidewalk at or near the place where the defendant was distributing them; and it is not pretended that the rights of any person were interfered with by defendant, or that any teams or horses were frightened. There was no indiscriminate scattering of the papers to the winds, and the cards of the size of one and one-half inches by two inches contained nothing but what was legitimate and proper for publication and distribution. The card itself was not only harmless, but the words printed thereon were an invitation to a moral and Christian assembly of people, gathered together for the public good. If this act can be classed as an offense punishable by fine and imprisonment, then selling or distributing newspapers upon the streets of the city would be punishable in the same way.

To render ordinances reasonable, they should tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred. The unreasonableness of this ordinance is made apparent when we consider the penalty which may be imposed for its violation,—a fine of $100, and costs of prosecution, and, in default of payment, imprisonment in the county jail or Detroit house of correction for a period of six months. If the conviction could be sustained, then any person upon any public street or alley, anywhere within the corporate limits of the city of Detroit, giving away advertising cards, however remote the street or alley from the business centers, could be convicted and punished in like manner. Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. Under our constitution and system of government the object and aim is to leave the subject entire master of his own conduct, except in the points wherein the public good requires some direction or restraint. What direction or restraint is required for the public good in the mere act of giving away an advertising card or hand-bill? This part of the ordinance is not aimed at the littering up of the streets, or to the frightening

of horses, but the offense is made complete in itself by the mere act of distributing or giving away of these enumerated articles.

In Frazee's Case, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310, it was held by this court that a city ordinance providing that "no person or persons, associations or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor of said city," is unreasonable and invalid, because it suppresses what is, in general, perfectly lawful, and leaves the power of permitting or restraining processions to an unregulated official discretion. In that case Chief Justice Campbell, speaking for the court, said: "No one in his senses could regard a penalty of $500 for such trivial offenses as most of those covered by this by-law as within any bound of reason." Many decisions of the courts of other states are to be found holding by-laws, much less stringent and arbitrary in their terms, unreasonable and invalid. 1 Dill. Mun. Corp. § 253; Clinton v. Phillips, 58 Ill. 102, 11 Am. Rep. 52; Kip v. Paterson, 26 N. J. Law, 298; Commissioners v. Gas Co., 12 Pa. 318; Com. v. Robertson, 5 Cush. (Mass.) 438.

This ordinance not only does not come within the power granted by the charter, but it is also unreasonable and unwarranted. It follows that the conviction must be set aside, the proceedings quashed, and defendant discharged. The other justices concurred.

OFFICERS, AGENTS, AND EMPLOYÉS

I. Eligibility [1]

STATE ex rel. TAYLOR v. SULLIVAN.

(Supreme Court of Minnesota, 1891. 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, 22 Am. St. Rep. 729.)

Application for quo warranto.

DICKINSON, J. By this proceeding, the relator seeks an adjudication as to the right of the respondent to hold the office of county attorney of Stearns county, for which office he received a majority of the votes cast at the general election in 1890. The point of contention is whether the respondent was legally elected, and can hold the office under such election, he being of foreign birth, and having never declared his intention to become a citizen of the United States until after such election.

The contention that the relator has no such private interest in the matter as justifies him to invoke a decision upon it, is not sustained. The relator was elected to the office at the election in 1888, qualified and entered upon the discharge of its duties. He is still the incumbent of the office, unless he has been superseded by the respondent, or unless a vacancy has occurred by force of the statute. The term of office for which the relator was elected was "two years, and until his successor is elected and qualified." Gen. St. 1878, c. 8, § 210. If the election of the respondent was not legally authorized, the relator would continue to hold the office by force of this express provision of the statute. State v. Benedict, 15 Minn. 198 (Gil. 153); People v. Tilton, 37 Cal. 614. The case in this particular is distinguishable from that of County of Scott v. Ring, 29 Minn. 398, 13 N. W. 181. We therefore hold that the relator's interest entitled him to call in question the legality of the respondent's election.

We come then to the question of the right of the respondent to hold the office by virtue of his election in 1890. It appears that at the time of the election, the respondent was not a citizen of the United States, and had not declared his intention to become a citizen, conformably to the laws of the United States upon the subject of naturalization. He relies, however, upon the fact that after the election, and before the commencement of the term of office for which he was elected, he duly declared his intention to become a citizen; and so the fact is shown to be. It is not to be questioned

[1] For discussion of principles, see Cooley, Mun. Corp. § 56.

that at the election in 1890, the respondent was not entitled to vote at any election in this state. The constitution (article 7, §§ 1, 2) so declares. Section 7 of the same article reads: "Every person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution, or the constitution and laws of the United States." This was intended as a restriction, and it has the effect of a constitutional declaration that only such persons as by the provisions of this article are entitled to vote shall be "eligible" to any elective office.

We need not dwell upon this proposition, for the argument for the respondent virtually concedes it. He rests his case upon the proposition that this restriction refers merely to the holding of office, and not to elections, and hence that he was legally entitled to the office, because his disqualification was removed before the commencement of the term, although subsequent to the election. This question has not been heretofore decided in this state. The terms of the statute construed in Territory v. Smith, 3 Minn. 240 (Gil. 164), 74 Am. Dec. 749, were such that the decision has no bearing upon the construction of the very different language of the constitutional provision under consideration. The case of Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304, relating to a different constitutional provision did not involve the question here presented, although language was used in the opinion of the majority of the court in harmony with the contention of this respondent.

Our inquiry is as to the meaning of the word "eligible" as used in the constitution. In Webster's Dictionary its meaning is defined to be, "proper to be chosen; qualified to be elected." In this and the cognate words derived from the same source—the Latin verb "eligere"—the idea primarily involved is that of choosing, selecting. It is expressed in our verb "to elect," derived from the same Latin word. This primary and strictly proper signification of the word "eligible" is also its well-understood popular meaning. If we had adopted the form "electable" for the adjective instead of following more nearly the form of the verb from which it is derived, the meaning might have been more obvious, but it would not have been different. There seems to be no sufficient reason why the proper and ordinary meaning should not be given to the word "eligible," in the constitution, as though it had read, "no person shall be qualified to be elected," etc. This is the plain and natural construction of the language, and the other provisions with which that immediately under consideration is associated, add to the probability that this word was intended to refer to the election to office, and not merely to the holding of office.

The whole article relates to the elective franchise. It declares the disability of certain classes, including persons of foreign birth who have not declared their intention to become citizens of the United States, to vote at any election. That declared disability certainly relates to the time when an election takes place. Closely associated with this is the provision in question, which in legal effect declares that the persons thus disqualified to vote shall not be "eligible to any office" elective by the people. Neither the proper signification of the language, nor the context, justify the conclusion that at this point there is an abrupt transition in the subject from elections to the holding of office. Elsewhere in the constitution we do find express provision relating to disqualification for holding office as in section 11 of article 6, and in section 9 of article 4.

Again, the positive and unambiguous restriction upon the right to vote at any election is in itself a reason supporting the conclusion that when the disqualified classes are declared to be ineligible to any elective office, it was meant that they could not be legally elected, or electable, if we may use such a word. There is little reason to suppose that it was intended that persons who by reason of their alienage, or for other specified reasons, were expressly excluded from the right to vote at any election, should still be deemed qualified to be elected to any office. In State v. Murray, 28 Wis. 96, 9 Am. Rep. 489, it was considered to be a fundamental principle of popular government, even in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office. According to the opinion of Ryan, C. J., in the later case of State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512, this proposition should in principle be more broadly stated, and only such persons as are themselves electors at the time of the election should be deemed to be eligible to office. We think that this must certainly be so considered under a constitution which in effect declares that only such persons shall be eligible to elective offices.

The construction which we place upon the constitution is supported by Searcy v. Crow, 15 Cal. 117; State v. Clarke, 3 Nev. 566; State v. McMillen, 23 Neb. 385, 36 N. W. 587. In Smith v. Moore, 90 Ind. 294, (followed in Vogel v. State, 107 Ind. 377, 8 N. E. 164,) the word "eligible" was construed as referring to the time of the commencement of the term for which a person is elected. The dissenting opinion of Elliott, J., referring to the earlier decisions in that court, is worthy of attention. Our conclusion is that as the case now appears, the respondent was not legally elected to the office, and that his subsequent declaration of his intention to become a citizen does not entitle him to hold the office.

It is therefore ordered that the respondent's motion to dismiss the order to show cause be denied, and that the application of the relator for a writ of quo warranto be granted.

II. Appointment and Election [2]

LAWRENCE v. INGERSOLL.

(Supreme Court of Tennessee, 1889. 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870.)

SNODGRASS, J.[3] The bill in this cause was filed by J. C. Lawrence, claiming to be a duly-elected and qualified member of the board of education of the city of Knoxville, for an injunction against defendants and the other four members of said board, to prohibit the meeting and action of said board without him, and to compel defendants, by mandamus, to recognize him as a member of the board, and permit him to take part in its proceedings, upon allegations of refusal of defendants so to do. The injunction issued, and, on final hearing, mandamus was awarded as prayed for. Respondents appealed, and assigned errors. * * *

Was the complainant elected, and is he therefore entitled to compel the defendants to admit and recognize him as a member of the board? To determine this it is necessary to examine his claim to election, and then ascertain if, under the law, it is well founded. To support the first, he shows the following record of the minutes of the proceedings of the board of mayor and aldermen, in addition to the notification or certificate of the recorder, before referred to,—an indorsement, thereon of the recorder that complainant had taken the oath required by law:

"At a call meeting of the board of mayor and aldermen of the city of Knoxville, held Friday, Jan. 27, A. D. 1888, there were present, and answering roll-call, Aldermen Selby, Barry, Hockenjos, Jones, Albers, House, Perry, and McDaniel. * * * Alderman Perry moved to go into an election of the city school board, to fill out the unexpired term of Hon. M. J. Condon resigned. Motion carried. * * * Alderman Perry nominated F. L. Fisher. Alderman Jones nominated Rev. J. C. Lawrence. The ballot was taken, and it was found that J. C. Lawrence had received four votes, and F. L. Fisher three votes, and a blank without any name was also found, and thrown out. Mayor Luttrell declared J. C. Lawrence legally elected as a member of the city school board of education, to fill out the unexpired term of Hon. M. J. Condon, resigned. * * *"

The provisions of the charter in relation to the election are found in several sections of the act of June 10, 1885, entitled "An act to reduce

[2] For discussion of principles see Cooley, Mun. Corp. § 57.

[3] Part of this opinion and all of the dissenting opinion of Turney, C. J., are omitted.

the act incorporating the city of Knoxville, and the various amendments thereto, to one act, and to amend the same." Section 63 of this act provides that there shall be a board of education for the city, to consist of five members,—citizens of the town, and not members of the board of mayor and aldermen.

"Sec. 64: The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town by ballot; and the term of office of each member shall be five years."

"Sec. 3. * * * The board of mayor and aldermen shall be composed of nine aldermen."

"Sec. 4. * * * The mayor shall not vote, except in case there shall be a tie vote, on any question, and then he shall by his vote decide the question."

"Sec. 5. * * * It shall require a majority of the members of the board to form a quorum for the transaction of business."

No provision being made for the filling of vacancies in the board of education, this defect was remedied by an ordinance as follows: "In case any vacancy shall occur in the board of education, the unexpired term of such member vacating shall be filled by an election by the board of mayor and aldermen, as soon as practicable after such vacancy occurs." * * *

It is observed that there are nine aldermen, who, with the mayor, are to make the election, if all are present,—the mayor having no vote,—as no tie could result; that if less than nine are present, but a majority of that number, then those present may elect; but, if equally divided in an election, the mayor may cast the deciding vote,—the only contingency in which his act can affect the question. In the election now being considered a majority (eight) were present, and participating in the election. This appears both in the recitals of the records herein before shown and in the fact that seven ballots were cast for the candidates, and one blank ballot. It remains now to inquire, what is the effect of this action on the part of this board, acting through its eight members and authorized quorum? In determining this question, it must be borne in mind that we are not examining the effect of an election of an indefinite number of electors, as the vote of the body of the people of the city, or the vote of any indefinite number of people, in a popular election; or the rule governing the one is entirely different from that governing the other. In the case of general or special elections by the vote of the people,—by the vote of an indefinite number,—the common-law rule is that a plurality of votes elects. That is, the candidate getting more votes than any other is elected, although he does not get a majority of the votes cast, and hence it makes no difference that there are absent voters, or blank votes cast. They do not change the fact that one candidate receives a plurality; and cannot do so, in the very nature of things. Cooley, Const. Lim. (5th Ed.) 779. * * *

It is equally well settled, and, indeed is not open to controversy, that when an election is to be made by a definite body of electors, as members of a board of aldermen, that, "in the absence of special provision, the major part of those present at a meeting of a select body must concur, in order to do any valid act." 1 Dill. Mun. Corp. § 220. * * *

We have heretofore seen that under this charter a majority of the quorum is required. This author shows, further, that the rule respecting the election by a definite number in a municipal body extends also to other bodies of definite numbers, as legislative, etc., and shows that in such case a majority must concur, and vote for the candidate, in order to elect him. Quoting several cases and instances of high authority, he says, illustrating: "By section 15 of the Revised Statutes of the United States it is provided that all votes for senators shall be by viva voce vote of members of the legislature, and, by section 27, that all votes of representatives in congress must be written or printed ballots; and that all votes received or rendered contrary to such action shall be of no effect. It has been held that when there is no provision of law making a plurality sufficient for an election a majority of the votes cast must be for a candidate, in order to elect him." Id. 332, citing State v. Fagan, 42 Cong. 35. He cites several cases sustaining the text, the notes being as follows: "In the absence of any act of congress on the subject, a state may pass a law, or a joint or concurrent resolution of the legislature, requiring a majority of all the members elected to both branches of the legislature to elect a senator of the United States; and in such a case, where twenty-nine votes are given for one candidate, and twenty-nine blank votes were given, it was held that this did not constitute an election. Yulee v. Mallory, 2 Cong. El. Cas. 608; Senate El. Cas. 146." And again: "In 1866, in the Stockton Case, in New Jersey, (Senate El. Cas. 264,) it appeared that there was no law in the state regulating the election of senators, and there had been a practice of regulating the election of all officers by resolution of the convention; and at the convention for the election of senators in 1865 a resolution was adopted that a plurality of the members present might elect. The judiciary committee, reporting through Senator Trumbull, decided in favor of the validity of the election; but the resolution was amended by the close vote of 22 to 21, and the candidate was declared not elected. It was claimed by some of the senators that "the parliamentary law required a majority to elect, and this could only be changed by a law or resolution of the house, acting in the legislative capacity." Id. 332.

Thus it appears by concurrence of text-book, judicial, senatorial, congressional, and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate, in order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority, if blank ballots are ex-

cluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote; that it is not sufficient that a majority were not cast against him, to be elected. The majority must be cast for him. "So, if a board of village trustees consists of five members, and all, or four, are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two, will not make it valid. If three only were present, they would constitute a quorum. Then, the votes of two, being a majority of the quorum, would be valid. Certainly so, where the three are all competent to act." 1 Dill. Mun. Corp. § 217. These authorities answer the proposition, urged by complainant, that the blank vote must not be considered, and it must be treated as though only 7 votes were cast, and he got 4. It is true that the blank vote cannot be, in the technical sense, a ballot, but it is nevertheless, an act of negation,—affirmative in showing that another voter acted negative in determining the majority. It was one of eight, attempted to be cast with the purpose of not supporting complainant, and is only to be counted in showing that he did not get a majority, just as would have resulted had it been an illegal vote,—as being for two candidates, or otherwise.

But complainant's case would be no better if that vote was entirely disregarded, because the record otherwise shows that eight aldermen were present; and, without reference to their vote, he must have received five votes in order to be elected. The roll-call shows eight present. On the vote to reconsider, eight voted. Indeed, it is not anywhere pretended by complainant that they were not all present and participating; and, nowhere the contrary affirmatively appears. But it is said that the mayor declared the election carried, and that this is equivalent to a vote for him; and, with four votes for him and four not for him, the mayor's vote or action makes the election. There are several answers to this, all conclusive. First, the mayor had no right to vote, as there was no tie; and, second, he did not vote; third, his action, declaring the result, without voting, would not make an election, because the law does not allow him to declare a candidate, even on a tie, elected, without voting at all. He could only, in such cases, vote, and make an election; and, when he does this, it makes it, even though he should then declare the candidate not elected.

A still further argument is made, however, that the board appears to have ratified it, and this should be treated as giving validity. The answers to this are, if possible, even more conclusive. They are—First. That the board has not power to elect, except by ballot. There was never but one ballot cast, and, if that did not make it, no election could otherwise be made. Second. The board did not ratify it. On the contrary, four members voted to reconsider, and therefore against ratification, and four for it. This, at least, while unimportant, was not

an affirmation. It was, at most, but a tie, which the mayor might by his vote have decided. He did not choose to vote, but, instead, declared the matter lost. In both instances the mayor refused or failed to vote, and contented himself with declaring that the results stood accomplished without his vote. We are not presenting the parliamentary question, or attempting to show that four against four would rescind any legal action. We are only showing that no majority ever in any way voted to ratify an election. The argument need not be repeated here that this meant nothing, and accomplished nothing. The law is that they could not make an election by ratification, and the fact is they did not. In addition to the effort to reconsider, it is said, as evidence of ratification that on the notification, called a "certificate," of the recorder, in which he advises complainant of his election, he appends to that statement the words, "by order of the board," and that this is evidence of ratification. Having shown that ratification could not make, or make valid, an election, it is perhaps superfluous to deal with the evidence of it; but, having denied the fact, it is proper not to overlook this point, as bearing on the question of fact as to whether or not any act of the board was an attempted ratification. We have seen that the recorder has nothing to do with the election, either to make or declare or certify it, under the charter. This whole paper, including indorsement, therefore, goes for nothing. His statement, in a paper that he was not required to make, that it was done by order of the board, would not prove that fact, of course; and no other evidence of it is offered. He may, and doubtless did, think himself authorized to make it, and may have been ordered to do so; but no such order is produced, and nothing else proves it.

The construction herein given to the charter regulating municipal elections and the action of municipal boards is not only sound in law, but in policy. It would be of the most injurious consequence to hold that municipal bodies could make elections or appropriate money, legislate rights away or pass measures affecting vast property interests, by less than an affirmative vote of an acting majority. It is going sufficiently far to allow them to vote by majority of a quorum present; but if, by legislative act or judicial construction, they should be authorized to act by a majority of a quorum, there would be no safe-guards effectual to protect the public, within the scope of their authority. It is equally salutary to provide, by following well-founded principles and precedents, that what they will not or do not in fact do by vote they shall not accomplish by declaring it done without vote. Reverse the decree, and dismiss the bill, with costs.

III. Officers De Facto [4]

OLIVER v. JERSEY CITY.

(Court of Error and Appeals of New Jersey, 1899. 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228.)

Certiorari by the state, on the prosecution of David W. Oliver, against the mayor and aldermen of Jersey City and the Greenville & Hudson Railway Company, to review an ordinance of the board of street and water commissioners of Jersey City. Ordinance set aside (63 N. J. Law, 96, 42 Atl. 782), and defendants bring error.

NIXON, J.[5] On September 19, 1898, the board of street and water commissioners of Jersey City passed "An ordinance granting to the Greenville and Hudson Railway Company permission to cross Communipaw avenue with its tracks at grade, and regulating such crossing." The ordinance was vetoed by the mayor, but was passed again, notwithstanding the objections of the mayor, on the 3d of October, 1898. The defendant in error, a resident and taxpayer of Jersey City, was allowed a writ of certiorari, and a judgment of the supreme court was afterwards obtained setting aside the ordinance, and this writ of error brings that judgment before us for review. * * *

But the ordinance is assailed principally upon the ground that it was not legally adopted. The board of street and water commissioners is the governing body of Jersey City, and it enacts all the local laws of that city respecting streets and water. It consists of five members, and the ordinances passed are subject to the mayor's approval, and, if vetoed by him, may be again passed, notwithstanding his objections, by four votes of the board. 1 Gen. St. p. 466. The ordinance in question was adopted at a regular meeting held September 19, 1898, there being four votes for and one against it. It was vetoed by the mayor on September 28th, and finally passed, over his veto, on the 3d of October, 1898, receiving the same number of votes. But the contention is that one of them was not such as could give efficacy to the ordinance. It was cast by Robert G. Smith, who had been mustered into the United States service as colonel of the 4th regiment of New Jersey volunteers, on July 18, 1898. The statute creating the board of street and water commissioners provides (1 Gen. St. p. 465) that "no such commissioner shall accept or hold any other place of public trust or emolument within the elective franchise, nor any appointment to public office, unless he shall first resign his said office, and if he shall accept such other office without having resigned his office of such commissioner, upon his acceptance of such place of

[4] For discussion of principles, see Cooley, Mun. Corp. § 59.

[5] Part of the opinion is omitted.

appointment, his office shall thereupon become vacant." While there has not been furnished the best proof that Smith actually accepted the office of colonel, yet, in the absence of any rebuttal, we shall hold, as did the court below, that it is sufficient, and that he did accept such office. * * *

The question at issue is thus narrowed down to the efficacy of Smith's vote in the adoption of the ordinance. Without his vote, it could not have been passed over the veto, neither could it without every other vote it received, and it is not strictly accurate to say that his vote had any more potency than any other. After his appointment, Smith continued to discharge the duties of his office as commissioner, and was present and voted when the ordinance was adopted, as the official minutes show. It would therefore be a pure solecism to call the office vacant at that time, except in the strictly legal sense of having no occupant with a de jure title. The acts done by Smith in respect to the adoption of the ordinance were neither more nor less than he would have done had the 4th regiment never been organized. It is therefore manifest that the words of the statute (1 Gen. St. p. 465) already quoted, declaring that when a commissioner accepts another office his former office shall become "vacant," cannot mean, in a situation like this, that it is corporeally vacant; for the person lawfully elected to fill it remained in possession discharging its duties. Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words, in such circumstances, is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or, if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary afterwards to resort to quo warranto proceedings to obtain actual possession of the office.

Under the old rule of common law, upon accepting another and incompatible office, the first became vacant, and, if the occupant refused to abandon it, a writ of quo warranto to determine the question of incompatibility was the remedy; and where the common law has been superseded by statutes declaring a vacancy under like circumstances, and the occupant remains, a similar course must be pursued to obtain possession, or such other steps as the facts may warrant. There are familiar precedents in our own state which illustrate the rules here stated. In Clark v. Ennis, 45 N. J. Law, 69, the court said: "It is clear, both upon reason and authority, that a statute declaring an office vacant, for some act or omission of the incumbent after he enters upon his duties, does not execute itself." * * * The same practice prevails in other states, and the rule is clearly stated in State v. Jones, 19 Ind. 356, where it is said: "Where it appears, prima facie, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed be-

fore procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust the incumbent, or fail to oust him, in some mode prescribed by law."

Smith, then, being in the office under color of a legal title ab origine, and no other person claiming a right to it, was he a commissioner de facto? Lord Ellenborough, in 1805, in Rex v. Bedford Level, 6 East, 356, said: "An officer de facto is one who has a reputation of being an officer; who assumes to be, and yet is not, a good officer in point of law." This definition has never been questioned, and all those given by the text writers since are little more than variations of this one. Tested by this ancient or any modern definition, Smith must be held to have been such an officer when this ordinance was passed. He certainly had color of title and reputation; for the legal voters of Jersey City elected him in the spring of 1898 a member of the board for the term of three years, and he duly qualified as such, and entered upon his duties, with the full knowledge and acquiescence of the public. He had never resigned, the board had not been abolished, and his term had not expired. * * *

He did not assert a right which any other person claimed, or perform any official duties that any one else pretended to have any right to perform in his stead, but only those duties which belonged to the office he was elected to fill, and which the law contemplated should be done, and the public expected him to do when they elected him; for the law creating the board provides that the judgment and wisdom of five commissioners should determine the questions that arise in the passage of ordinances concerning the streets. The board, also, recognized his membership. He participated in their proceedings. His name was called and vote recorded in the adoption of ordinances, and, if not present, his absence was duly noted in the official minutes. With all these facts and circumstances appearing in the record, and undisputed, we must hold that Smith was a commissioner de facto.

This conclusion is in accord, we think, with the decisions in this state and elsewhere on this subject. In Dugan v. Farrier, 47 N. J. Law, 383, 1 Atl. 751, Justice Dixon said: "One who assumes an office legally, and in good faith remains in it after his title has ended, is a de facto officer." The same doctrine was held in Flaucher v. City of Camden, 56 N. J. Law, 244, 28 Atl. 82. * * * In the case of Sheehan, 122 Mass. 445, 23 Am. Rep. 374, one Mr. Hawkes, while holding the office of justice of the peace, was elected to the state legislature, and had qualified and entered upon his duties, but continued to act as justice, although the constitution of Massachusetts provided that, upon accepting another office, that of justice should become vacant; but the court, by Justice Gray, said: "If Mr. Hawkes, by taking his seat in the house of representatives, ceased to be a jus-

tice de jure, he was, by color of the usual signs of judicial office, sitting in the court, using its seal, and attended by his clerk, and, no other person having been appointed in his stead, a justice of the peace de facto." Decisions of like import may be found in every state.

Smith being a commissioner de facto when he voted for the ordinance, it must, upon the application of well-settled legal principles, be held valid and effective as to the rights of the public and third persons. In Mitchell v. Tolan, 33 N. J. Law, 195, Justice Depue said: "Premising that an officer is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office, as distinguished on the one hand from a mere usurper of an office, and on the other from an officer de jure, the acts of an officer de facto are valid, as far as the rights of the public or third persons are concerned." In Woodside v. Wagg, 71 Me. 207, it was held that "a person exercising the functions of a valid public office by color of right will be deemed to be an officer de facto, and his acts will protect third persons, although he has legally forfeited his office by the acceptance of an incompatible one." In State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, it was said: "The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and of individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. * * *

But this legal protection is not afforded where the defects in the title of the officer are notorious, and such as to make those relying on his acts chargeable with such knowledge. What, then, may be considered notice sufficient to warn third persons and the public? The expiration of the term of an officer, and the appointment or election and qualification of his successor; the resignation of a public officer; the abolition of the office itself by an act of the legislature; the refusal of the board or legislative body of which the officer is a member to recognize him; or the judgment of a court against the title of the officer,—are such facts as third persons and the public are, as a general rule, required to take notice of. But in this case none of these facts existed, but just the contrary were known to every citizen of Jersey City. All knew that Smith had been legally elected; that he had not resigned; that his term had not expired; that no court had questioned his right to serve; that no one claimed a right to his seat; that the board had not been abolished; that the members recognized him as one of their number; and that he took part in their proceedings. All of these things were enough to confirm the belief of third persons and the public in Smith's right to serve them. If it was publicly known that he was colonel of the 4th regiment, it was quite as publicly known on the 3d of October, when the ordinance was adopted, that the war with Spain had ended, and only the terms of a formal treaty of peace were being considered. Whether he had in fact accepted the office of colonel, and what the nice distinc-

tions are between de jure and de facto officers, they could not be expected to know, nor were they bound to know, before accepting the benefits of any ordinance he might by his vote assist in passing.

Another significant proof of the general acquiescence of the public in Smith's exercise of the office appears in the fact that the mayor of the city, whose veto, as printed in the record, manifests great hostility to the ordinance, well knew that the four votes that first passed it could pass it over his veto, and who had the power to fill a vacancy in the board, if he believed that any existed, had failed to make any attempt to appoint a successor, although he had been mustered into service in July. The mayor, as the chief representative of the public, had, so far as the record shows, acquiesced in his exercise of the office, and in his veto message does not claim that any illegal vote was cast for the ordinance. * * *

There are no facts in this case to justify us in relaxing the wise and ancient rule, so deeply rooted in public policy, that the acts of de facto officers, holding under color of a title originally lawful, when acting in good faith, will protect third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body. * * *

But this case rests entirely upon the question whether Smith, when he voted for the ordinance in dispute, was a commissioner de facto, and his acts, therefore, valid, as far as the rights of third parties and the public are concerned. We hold that he was such an officer, and that the ordinance is valid. This conclusion results in a reversal of the judgment of the supreme court setting aside the ordinance.

IV. Salary [6]

MARQUIS v. CITY OF SANTA ANA.

(Supreme Court of California, 1894. 103 Cal. 661, 37 Pac. 650.)

Action by W. H. Marquis against the city of Santa Ana for salary as assessor. Judgment for plaintiff. Defendant appeals.

HARRISON, J.[7] The plaintiff was elected to the office of city assessor of the defendant on the 13th of April, 1891, and entered upon the duties of his office April 20, 1891. Previous to his election, viz. March 16, 1891, the salary of that office had been fixed by an ordinance of the city at $375 per year, payable one-half thereof on the first Monday of July, and one-half thereof on the first Monday of September. March 2, 1891, the legislature passed an act (St.

[6] For discussion of principles, see Cooley, Mun. Corp. § 61.

[7] Part of the opinion is omitted.

1891, p. 22) providing that in cities in this state, excepting municipal corporations of the first, second, third, and fourth classes, and cities operating under a freeholders' charter, the assessment of property made by the county assessor might be made the basis of municipal taxation. The act, however, contained the following proviso: "Provided, however, that the provisions of this act shall not apply to or be in force in any city or municipal corporation until its board of trustees, common council, or other legislative body, shall have passed an ordinance electing to avail itself of the provisions of this act, and filed a certified copy of the same with the auditor of the county in which such municipal corporation or city is situated on or before the first Monday in March of each year."

The defendant is a municipal corporation of the fifth class, and on February 15, 1892, through its board of trustees passed an ordinance electing to avail itself of the provisions of the above act, and by the same ordinance repealed its former ordinance fixing the compensation of the city assessor. A copy of this ordinance was filed with the county auditor of Orange county, in which the city of Santa Ana is situated, on February 23, 1892. March 21, 1892, the defendant passed an ordinance repealing a prior ordinance providing for a street poll tax; so that all of the duties imposed upon the assessor by virtue of any city ordinance were taken away. After the passage of these ordinances, the plaintiff performed no duty as city assessor, except to make out the list of male persons over the age of 21 years residing within the limits of the city, required by section 787 of the municipal government act. The defendant refused to allow or pay to the plaintiff any salary for the second year of his incumbency of the office, and he thereupon brought this action. * * *

2. Section 755 of the municipal government act (St. 1883, p. 251) provides: "The clerk, treasurer, assessor, marshal, city attorney and recorder shall severally receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." The power of the legislature to abolish the office of city treasurer, or to change the compensation of the officer, or its power to authorize the city to change his compensation during his term of office, is not presented in the present case, as the legislature has neither abolished the office, nor changed the compensation, nor given to the city the authority to make such change. As the power of the defendant to fix or change the salary of its officers rests entirely upon statute, the exercise of this power is subject to all the limitations contained in the statute.

The plaintiff was elected to the office of city assessor after the adoption of the ordinance fixing the amount of his salary, and the limitation in the above section that his compensation shall not be increased or diminished during his term of office renders the act of the defendant repealing the ordinance fixing his salary nugatory.

As the defendant could not directly, by express ordinance for that purpose, diminish the amount of his salary, the same result could not be accomplished by it indirectly, either by accepting the provisions of the act of March 2, 1891, or by doing away with the necessity for his services through its adoption of the ordinance abolishing the street poll tax. The right of an officer to the salary fixed by law for that office is not impaired by any change that may be made in the duties of the office, or even by an entire cessation of those duties, so long as the office itself remains in existence.

3. It is urged by the appellant that its election to avail itself of the provisions of the act of March 2, 1891, had the effect to abolish the office of city assessor. As the office is, however, created by the legislature, it could not be directly abolished by the city; much less could its abolition be implied from any act that did not in terms purport to abolish it. The office is provided for in section 752 of the municipal government act, which has never been repealed; and the act of March 2, 1891, instead of sustaining the suggestion of an implied repeal of that section, expressly declares that its provisions shall not be given force in any city until it shall have passed an ordinance electing to avail itself thereof, on or before the first Monday in March of each year, thus implying that the office continues to exist. The duties of the city assessor are fixed by section 787 of the municipal government act; and while it may be conceded that the election by the defendant to avail itself of the provisions of the act of March 2, 1891, did away with the necessity for the performance by the assessor of any acts connected with the assessment of property, theretofore imposed upon him, so long as such election remained in force, it does not follow that the office of assessor was thereby abolished. Section 787 prescribes as one of the duties of this office that "the assessor shall during said term also make a list of all male persons residing within the limits of such city over the age of twenty-one years, and shall verify said list by his oath, and shall on or before the first Monday of August in each year deposit the same with the city clerk."

It is urged by the defendant that, inasmuch as the only apparent object for which this list is to be made is to form the basis for collecting an annual street poll tax, the repeal of the ordinance providing for the street poll tax relieved the plaintiff from the duty of preparing this list. The statute, however, under which he holds his office, makes the preparation of this list one of his official duties; and we are not at liberty to assume that the only object of this requirement was to enable the city to collect a street poll tax, or that he would be justified in omitting this official duty prescribed by the statute, even though the city, by its ordinance, rendered his act in preparing it of no avail to it. The city had still the power to pass an ordinance imposing this tax, and might then avail itself of the list thus prepared; but, whether the duties have been increased or diminished, or entirely dispensed with, so long as the office remains, the

salary affixed thereto is an incident of the office, and must be paid to the incumbent. We have, however, seen that the office has not been abolished; and the defendant does not contend that, if the office is still in existence, the respondent is not its incumbent.

It follows that he is entitled to the salary attached to the office at the time of his election, and that the action of the court in holding this defense to be unavailing was correct. The judgment is affirmed.

V. Removal [8]

STATE ex rel. HART v. CITY OF DULUTH.

(Supreme Court of Minnesota, 1893. 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.)

Certiorari in the name of the state, on relation of James Hart, Jr., and others, against the common council of the city of Duluth and others, to review and quash the action of respondents in removing relators from the office of fire commissioners.

MITCHELL, J.[9] By the charter of the city of Duluth, all powers and duties connected with, and incident to, the government and discipline of the fire department of the city are vested in three commissioners, called the "Board of Fire Commissioners," who have entire control of the department, including the appointment and discharge of all employés connected with it, and making their own rules and regulations for the government of the same. These commissioners are "on nomination of the mayor," "appointed by the common council," and hold their office for the term of three years. The charter provides that "any member of said board may at any time be removed by a vote of two thirds of all the members elect of the common council of said city for sufficient cause: * * * provided, that the said common council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the day so assigned, and opportunity be given him to make his defense personally or by counsel." It is here sought, by certiorari, to review the proceedings of the common council in assuming to remove the relators from the office of fire commissioners. * * *

The first contention of relators is that the common council never acquired jurisdiction, because the notice of hearing and the copy of the charges were not served on them as required by the charter. The particular objection is that, when the service was made on them, the

[8] For discussion of principles, see Cooley, Mun. Corp. § 63.

[9] Part of the opinion is omitted.

resolution of the common council preferring these charges against them had neither been approved by the mayor, nor passed over his veto, as required by section 1, c. 3, of the city charter. There is no merit in this point. Under the charter the power of removal from office is vested solely in the common council, and the mayor has no power over, or control of, their proceedings in presenting or investigating charges against a city official with a view to removal from office. Their action in preferring charges against relators was not such an ordinance or resolution as comes within the purview of section 1, c. 3, and did not require the approval of the mayor before it took effect.

The next question is whether the charges presented were sufficient in law to constitute a cause for removal,—whether they were sufficient in form and substance to authorize the common council to proceed. "Cause," or "sufficient cause," means "legal cause," and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it. Bagg's Case, 11 Coke, 93b; Rex v. Richardson, 1 Burrows, 517–540; State v. Love, 39 N. J. Law, 14; State v. McGarry, 21 Wis. 496; State v. Common Council, 9 Wis. 254; People v. Thompson, 94 N. Y. 451. While the charges need not be stated with the technical nicety or formal exactness required in pleadings in courts, yet they must be specifically stated with substantial certainty. The specifications of the alleged causes should be formulated with such reasonable detail and precision as shall inform the incumbent what dereliction of duty is urged against him. There should be a statement of charges with a specification of facts constituting a sufficient cause for removal, sufficiently distinct to apprise the officer of the grounds upon which the charges are based. Andrews v. King, 77 Me. 224; People v. Thompson, supra; Dill. Mun. Corp. § 255. The sufficiency and reasonableness of the cause of removal are questions for the courts. Dill. Mun. Corp. § 252, and cases cited. This has been the settled law ever since Bagg's Case, supra, and we are not aware of any respectable authority to the contrary. Of course, cases (many of which are cited by respondents) where an officer or body was vested with an absolute power of removal at discretion are not in point.

Upon examination of the charges in this case we are clearly of opinion that they are not sufficient in law. Considering them as a

whole, they show on their face that they were not formulated in a very judicial frame of mind. They read more like a heated hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation. Many of them are mere glittering generalities, without any statement or specification of facts; such as, for example, "using their official positions to gratify their personal feelings and prejudices;" "that neither ability, impartiality, nor sense of justice characterize their management of one of the most important branches of the city government;" "that the gratification of their personal spites and prejudices is the paramount motive often actuating and controlling them in the supposed discharge of their duties;" "that they have no just appreciation of the responsibilities that should characterize the discharge of the duties of the important office of fire commissioner," etc. It hardly need be said that such general accusations as these are entirely lacking in any specification of facts to apprise any one of the grounds of the charges which he is called on to meet.

Some of the charges, such as that "the reasonable recommendations and requests of the common council are treated with the utmost contempt," have no relation whatever to the administration of the office of fire commissioner, and remind us of some of the charges in Bagg's Case. The first part of the fifth charge, viz. failure to make monthly reports to the common council, as required by the charter, was virtually abandoned, no attempt having been made to substantiate it, and hence may be left out of account altogether. The only charges that even attempt to state any specific cause for removal are the fourth and the last part of the fifth. Indeed, these are the only ones which counsel for respondents seriously attempts to support. The fourth relates to the discharge of officers of the fire department without cause, or from improper motives, but is entirely lacking in specifications of either dates or names. As the board of fire commissioners has, under the charter, absolute power to discharge any of the employés or officers of the department at their discretion, and may, in the performance of their duties, have had occasion to exercise this power frequently, so general and indefinite a statement is not sufficient to advise them what particular acts are the basis of the charge. The last part of the fifth charge, accusing the relators generally of being "incompetent" and "inefficient," without specifying wherein or in what respect, is also entirely too vague and general. We agree with counsel that "incompetency" and "inefficiency" in the discharge of official duty may be good grounds for removal, and that it may not be necessary to specify in detail particular acts or facts. But these words are so general that they may mean anything or everything which might constitute good cause for removal. For example, incompetency might result from physical disability, from mental disability, or from lack of integrity, etc. So, inefficiency might consist of habitual neglect of duty, incapacity to preserve discipline, or of a variety of things. Hence, while it is not required to go into details, yet the charges ought at

least to advise the officer in what respect he is claimed to be incompetent or inefficient.

Our conclusion is that none of the charges relied on are sufficient in law. This renders it unnecessary to consider the evidence at all. We may say, however, that a perusal of it impresses us with the feeling that it furnished no reasonable basis for the action of the council in removing the relators from office. It is perfectly apparent that this whole trouble grew out of a foolish quarrel between the common council and the board of fire commissioners, over the suspension by the latter of a fireman by the name of Twaddle. The proceedings of the common council in the matter are quashed.

VI. Personal Liability—Contracts [16]

LAWRENCE v. TOOTHAKER.

(Supreme Court of New Hampshire, 1908. 75 N. H. 148, 71 Atl. 534, 23 L. R. A. [N. S.] 428.)

Action by Archibald I. Lawrence against Oliver H. Toothaker and others. Verdict for plaintiff, and case transferred from the superior court on defendants' exception. The evidence tended to show the following facts: The plaintiff is an architect, and the defendants constituted the board of education in Berlin at the time of the contract in question. The defendants requested the plaintiff to make plans for a school building to take the place of one which had been burned, and, after some negotiations between the parties, a contract was agreed upon for his employment. Soon afterward the defendants notified the plaintiff to cease working on the plans, as they did not wish to use them. He replied that he should hold them to the contract. He charged his services to the city of Berlin, and understood that he was dealing with the board of education. In a suit against the city on this account he was unsuccessful, upon the ground that the board of education had no authority to bind the city. Both parties acted in good faith in making the contract.

WALKER, J. The evidence is not sufficient to support a finding that at the time the contract was made the defendants intended to bind themselves personally, or that the plaintiff understood they did. No express promise on the part of the defendants was made, and it was not suggested by the plaintiff that the defendants were to be deemed the responsible contracting parties. Nor is there any evidence that the defendants suppressed any material facts relating to their author-

[16] For discussion of principles, see Cooley, Mun. Corp. §§ 65, 67.

ization to bind the city. Both parties acted in good faith, upon the assumption that the defendants were authorized to make the contract as representatives of the city; and, in accordance with that understanding, the plaintiff gave credit to the city.

It may be conceded that the defendants, as the board of education, had no authority to contract with the plaintiff for and in behalf of the city, and that the attempted exercise of such authority was futile. But it does not follow that the defendants bound themselves to pay for the plaintiff's services. Ogden v. Raymond, 22 Conn. 379, 384, 58 Am. Dec. 429. The board's want of statutory power to do what it attempted to do was as within the cognizance of the plaintiff as that of the defendants. Richards v. Columbia, 55 N. H. 96, 99; Sprague v. Cornish, 59 N. H. 161. The plaintiff was chargeable with knowledge of their official limitations; and, having voluntarily contracted with them in their official capacity and given credit to the city for the performance of the contract, he is in no position to claim that the defendants are personally responsible on the contract, in the absence of an express promise by them to incur that responsibility, unless the law would imply a promise of guaranty that they had the requisite power. But "where all the facts and circumstances surrounding the case are known to both the agent and third party, but there is a mutual mistake as to a matter of law—as the principal's liability or the legal effect of the agent's written authority—the agent cannot be held personally responsible by reason of the mere fact that the principal cannot be held, unless the agent by some apt expression guarantees the contract or assumes it himself." 2 Cl. & Sk. Ag. 582b; Jefts v. York, 10 Cush. (Mass.) 392.

And this principle of law is equally applicable when public officers, like the defendants, assume to bind the public by their contracts with third parties. Their authority is statutory; and whether their attempted exercise of it in a particular case is authorized is ordinarily a question of law, which the other contracting party has ample opportunity to investigate and decide for himself. If for any reason he is unwilling to incur that risk, an express guaranty by the other that he acts within the scope of his authority would be necessary to render the latter liable on the contract. Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82; Brown v. Rundlett, 15 N. H. 360; Farnam v. Davis, 32 N. H. 302. Cases like Weare v. Gove, 44 N. H. 196, do not conflict with this result. It was there expressly recognized (page 197 of 44 N. H.) that the agent cannot be held "where the promisee, being fully informed of the facts upon which the assumed authority rests, forms his own judgment, and contracts for and relies upon the engagement of the principal alone. In such a case it would be unjust that the agent should be bound because such was not the contract."

As the reported evidence negatives the idea that the parties intended that the defendants should be individually liable on the contract, and

as there is no evidence that they guaranteed their authority, or were guilty of any fraud upon the plaintiff, the defendants' motion for a verdict should have been granted. Exception sustained. Verdict set aside. All concurred.

VII. Personal Liability—Torts [11]

BOUTTE v. EMMER.

(Supreme Court of Louisiana, 1891. 43 La. Ann. 980, 9 South. 921, 15 L. R. A. 63.)

BREAUX, J. Plaintiff sues to recover $10,000 exemplary damages from the defendant, who is the mayor of the town of New Iberia. On the 24th of December, 1889, the defendant had him arrested and imprisoned from about 5 o'clock in the evening to about 8 o'clock a. m. of the day following. Plaintiff complains of injury, in that he was thus arrested without any process of law, and placed in jail maliciously, and without probable cause; that just preceding his arrest the defendant made an assault on him.

The plaintiff is a constable. He had arrested two negroes, and had taken them before a magistrate to answer to the charge of fighting and disturbing the peace. Without formal examination into the accusation, they were ordered to be released, and to pay one dollar each to the constable for having made the arrest. He left the office of the justice of the peace with the negroes, intent on collecting the two dollars, and threatening incarceration if the amount was not found. He was with these men some time in the street. His conduct, a witness testifies, was not orderly. Four witnesses testify that he was at the time under the influence of intoxicants. An officer himself, he should have been sober. The defendant met the plaintiff, and spoke to him, at first remonstratingly, is the testimony of certain witnesses. Soon after the words of each became intemperate.

Under an ordinance of the council, the mayor is vested with authority to punish disorderly persons by imprisonment for a short time, or the imposition of a fine, or both. In discharging the functions of his office, he has certain discretion. Unless he acts arbitrarily, and beyond the pale of his office, he cannot be made to pay damages.

The plaintiff's first grievance, upon which he bases some right of action, is that he was arrested without a warrant. This ground does not commend itself, for a warrant need not issue prior to arresting a person who openly commits a breach of the peace such as plaintiff was charged with having committed, and such as the preponderance

[11] For discussion of principles see Cooley, Mun. Corp. §§ 66, 67.

of evidence sustains with reference to the imprisonment. The peace and good order of the community requires it, and frequently one intoxicated is only improved by the experience, and restored to a sober condition.

The attempt made to sever the defendant, for the purposes of this suit, from his office, and hold him responsible personally, must fail. An officer will not be held responsible personally, unless it be clearly proven that he has acted arbitrarily and in violation of law. The violation and arbitrariness are not proven.

Judgment affirmed, at appellant's costs.

CONTRACTS

I. Contracting Agencies [1]

JEWELL BELTING CO. v. VILLAGE OF BERTHA.

(Supreme Court of Minnesota, 1903. 91 Minn. 9, 97 N. W. 424.)

Action by the Jewell Belting Company against the village of Bertha.

BROWN, J. Action to recover the value of certain fire extinguishing apparatus alleged to have been purchased of plaintiff's assignor by defendant, in which, on trial, the court below directed a verdict for defendant, and plaintiff appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial. The facts are as follows:

Defendant is an incorporated village of the state, and on the 9th of January, 1902, one S. S. Smith, doing business as the Minnesota Rubber Company, appeared before its council with a proposition to sell to the village a hand pump engine for extinguishing fires for the sum of $585. The council was desirous of purchasing an apparatus of the kind, and had previously sought terms and prices from manufacturers. After the submission of a proposition by Smith, the council adopted two motions, as follows:

"Motion made and seconded that Mr. Smith ship his hand pump engine fire machine subject to approval of village council. Motion carried; all members voting yes."

"Motion made and seconded to authorize the president and recorder to enter into contract with Mr. Smith for the purpose of purchasing hand pump engine and other articles, as per statement at meeting in council room. Motion carried; all members voting yes."

This record discloses the only action taken by the council in reference to the purchase of the engine. What occurred in the council room between the passage of the two motions just quoted does not appear, though counsel state that the proposition contained in the first motion was not accepted by Smith. Pursuant to the authority contained in the second motion, the president and recorder entered into a formal written contract with Smith by which they contracted, on behalf of the village, to purchase the fire apparatus, agreeing to pay therefor the sum of $585; and by this contract the rights of the parties must be determined.

The contract so entered into contained a provision that the engine should be subject to test trials satisfactory to the village council be-

[1] For discussion of principles, see Cooley, Mun. Corp. § 72.

fore acceptance. Thereafter Smith, acting under the contract, shipped the engine to the village by railroad; but the village council refused, and at all times since have refused, to accept or receive the same. Smith, subsequent to shipping, and after the arrival of the engine at Bertha, appeared and offered to test the same in the presence of the council, but the latter refused to take part in it or carry out the contract made by the president and recorder. Smith afterward assigned his claim under the contract to the plaintiff in this action.

Several questions are discussed in the briefs of counsel, but, as we view it, the case narrows down to one proposition, namely, whether the village council could delegate authority to the president and recorder to enter into a contract on behalf of the municipality for the purchase of the engine. If such authority could be so delegated, plaintiff is entitled to recover; otherwise the trial court was justified in directing a verdict for defendant, for it is not shown or claimed that the contract was made or ever ratified by the village council. The village council, under our statutes, is the governing body of the municipality, charged with the management of its affairs, legislative and administrative, and alone clothed with power and authority to enter into such contracts as are deemed necessary for the public welfare. The authorities very generally hold that such a body cannot in any case delegate to a member or committee thereof functions or prerogatives of a legislative or administrative character, or involving the exercise of judgment and discretion. Scollay v. Butte Co., 67 Cal. 249, 7 Pac. 661; House v. Los Angeles Co., 104 Cal. 73, 37 Pac. 796; Knight v. Eureka, 123 Cal. 192, 55 Pac. 768; Walsh v. Denver, 11 Colo. App. 523, 53 Pac. 458; Dillard v. Webb, 55 Ala. 468; Blair v. Waco, 75 Fed. 800, 21 C. C. A. 517; Thomson v. Boonville, 61 Mo. 282; Matthews v. City of Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Attorney General v. Lowell, 67 N. H. 198, 38 Atl. 270; Elyria Gas Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Foster v. Cape May, 60 N. J. Law, 78, 36 Atl. 1089; Phelps v. N. Y., 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626.

Merely ministerial functions may be delegated to an officer or committee. Harcourt v. Common Council, 62 N. J. Law, 158, 40 Atl. 690. But such power as requires the exercise of judgment and discretion must be performed by the body itself. Ministerial functions are those that are absolute, fixed, and certain, in the performance of which the board or officer exercises no discretion whatever. Performance may be compelled by mandamus or other appropriate proceedings, but powers and duties involving an exercise of judgment and discretion cannot be so compelled. This principle was applied by this court in Minneapolis Gaslight Co. v. Minneapolis, 36 Minn. 159, 30 N. W. 450. In that case it appeared that the charter of the city of Minneapolis authorized the city council, by ordinance, to erect lamps and provide for lighting the city, and to create, alter, and extend lighting districts.

It was held that the power so conferred required the exercise of judgment and discretion, and could not be delegated to a committee of the council, either in respect to establishing new lamps or discontinuing those already established. The reason for this rule is found in the fact that members of the council are chosen by the people to represent the municipality, charged with a public trust and the faithful performance of their duties; and the public is entitled to the judgment and discretion, in all matters where such elements enter into transactions on behalf of the municipality, of each member of the body upon which authority to act is conferred.

In the case at bar the purchase of a fire engine to aid in the extinguishment of fires occurring in the village, incurring an indebtedness in such purchase, and fixing the time and terms of payment, involved the exercise of the sound judgment and discretion of the village council; and, within the authorities cited, the power to so contract could not be delegated to the president and recorder. It follows, therefore, that the trial court was right in directing a verdict for defendant. There is no controversy about the facts. They are undisputed, and substantially as we have outlined above. Of the want of authority on the part of the council to authorize the president and recorder to enter into the contract, Smith was required to take notice. All persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing. 20 Am. & Eng. Ency. Law (2d Ed.) 1183; Newbery v. Fox, 37 Minn. 141, 33 N. W. 333, 5 Am. St. Rep. 830.

While ordinarily the acts of public officers are presumed to be authorized by law, want of authority affirmatively appears in this case, and the presumption is overcome and does not apply. Order affirmed.

II. Mode of Contracting [2]

BRODERICK v. CITY OF ST. PAUL.

(Supreme Court of Minnesota, 1903. 90 Minn. 443, 97 N. W. 118.)

Action by John F. Broderick against the city of St. Paul and others. Judgment for defendants, and plaintiff appeals.

LEWIS, J.[3] This action was brought for the purpose of enjoining the city St. Paul and certain of its officers, and respondent the Cleveland Vapor Light Company, from entering into and carrying into effect the terms of a certain contract for lighting a part of the city streets. * * *

[2] For discussion of principles, see Cooley, Mun. Corp. § 73.

[3] Part of this opinion and all of the dissenting opinion of Brown, J., are omitted.

The record discloses remarkable haste on behalf of the council in calling for the proposal, in considering the various bids, and in letting the contract. It would seem, as is perhaps usually the case, that it was a struggle between the agents of different lighting companies to see which could exercise the most influence with the various members of the council, and instead of giving everybody a full opportunity to be heard in open discussion upon all of the points involved, before finally awarding the contract, the matter was so rapidly rushed through as to give some ground for suspicion as to the motive of the participants. However, the trial court had ample opportunity to observe the witnesses and to weigh the testimony, and it found that the board of public works and the members of the common council acted in good faith, and in the exercise of an honest judgment and discretion. Therefore upon that branch of the case we accept the findings of the court as final. We also accept the conclusions of the court to the effect that the council were justified in rejecting the bid of the Western Street Lighting Company, although the lowest bidder. This leaves for consideration the question whether, in accepting the bid of respondent and in awarding to it the contract, the common council proceeded as required by the city charter.

Under chapter 4 are enumerated the general powers of the common council. In section 7 it is provided that every order, resolution, or ordinance which shall pass the board of aldermen and the assembly shall, before it becomes operative, be presented to the mayor of the city for his approval or rejection. If he approves, such resolution goes into effect, but, if returned without approval, the common council shall proceed to reconsider the same, and if, after such discussion, two-thirds of all the members of both bodies shall agree to pass it, it shall become operative notwithstanding the mayor's veto: provided that, if the mayor retains the resolution without returning it for the period of five days, it shall become operative, and provided that, in all cases where the original action of the common council requires a two-thirds or greater vote, the veto of the mayor shall be effectual, unless overruled by a four-fifths vote of all the members of the council. By section 6 it is provided that no appropriation of money, or resolution, order, or ordinance for the payment of money, or creating any pecuniary liability, shall be valid or operative unless it shall have passed each of the two bodies of the council by a vote of two-thirds of all the members of a full body, taken by ayes and noes, and entered upon the record of the proceedings. By section 8, that every order, resolution, or ordinance shall be published in the official paper before the same shall be in force, and shall be recorded by the city clerk in books provided for that purpose. Under the provisions of section 9, the entire city government is placed in the hands of the common council, who are authorized to proceed by the enactment of proper ordinances, rules, and by-laws for such purposes. By section 10, the common council shall have authority, by ordinance,

resolution, or by-law, among other things (division fiftieth), "to provide for lighting the city and all public buildings, to establish, erect and maintain, and cause to be operated gas works, electric lighting plants, or other works for lighting the city streets, public grounds and public buildings. * * *"

From these provisions it appears beyond question that in providing for the lighting of the city the common council are limited in their action to procedure by ordinance, resolution, or by-law. The language is clear and explicit. The scheme of government is framed upon the theory that all important matters are delegated to the representatives of the municipality, consisting of the board of aldermen, the assembly, and the mayor. It contemplates a free and open discussion and consideration of each subject of enactment by each body of the common council and the mayor; and the object is to not only secure free deliberation and independence by such bodies and the mayor, but also to provide notice to the public of their various proceedings. The scheme is drawn for the very purpose of avoiding that secrecy and speed which is possible by motion, and without submission to the mayor, and without the publication and notice necessary in respect to a resolution. Such being the evident purpose of the charter provisions referred to, they must control the action of the common council in respect to the subject under consideration, unless it is otherwise provided.

Chapter 15 contains specific direction regarding the letting of contracts, and section 1 reads: "All contracts for work to be done for the city of St. Paul, or for the purchase of property of any kind, for the public use of said city, except as otherwise provided for in this charter, in which the value of such work or the price or value of such property shall exceed the sum of two hundred (200) dollars, shall be let to the lowest responsible bidder, reserving to the council the right to reject all bids. In such case the common council shall require a notice of not less than six days for the time and place of letting such contract, by publication in the official paper of said city, which notice shall substantially describe the work to be done and such other particulars as the common council may order, and shall designate the time and place when and where sealed proposals shall be received therefor; the said proposals shall be opened and considered at the first meeting thereafter of either body of the common council, and upon any bid aforesaid being accepted, a contract in accordance therewith shall be drafted and submitted to said council for its approval; and upon the same being approved and signed by the presiding officer of each body of the said council, it shall be executed on the part of the city by the mayor and city clerk with the corporate seal of the city attached, and countersigned by the comptroller, and filed with the bond required by this charter in the office of such comptroller."

This section must be considered and construed in connection with all other provisions in the charter bearing upon the powers of the common council and city officers. Section 1, c. 15, treated by itself, does not designate how the several steps leading up to the consummation of a contract shall be taken—whether by motion or by resolution. We must look elsewhere, therefore, than in this section, for the specific expressions of authority and method of procedure. We look in vain for any express authority to proceed by motion with reference to the lighting of the city. On the other hand, as above pointed out in respect to such subject, the council shall proceed by resolution.

Another inference shows that there was an intention to control the procedure with reference to lighting the city, by resolution: Section 71, tit. 3, c. 6, provides that twice a year the board of public works shall make report to the common council of the condition of the gas and electric lamps for which the city is paying, and that, such report being received, the council shall, by resolution or ordinance, direct what lights shall be used in the future. This section is drawn in harmony with the provisions conferring express authority upon the council in chapter 4. If the framers of the charter, and the people in adopting it, considered the matter of the continuance of various lights in the city of enough importance to be submitted by the board of public works to the common council, and require it to proceed in a deliberate manner, by resolution, for so much greater reason should the council be required to so proceed with reference to contracts of greater importance. Therefore, in omitting to specify in section 1, c. 15, that the council should proceed by resolution, it was not intended to confer upon it authority to proceed by motion. On the contrary, it is evident that such omission to specify the line of procedure was a mere accident, and of no importance. However, did the city substantially comply with the provisions of section 1, conceding that the council should have proceeded by resolution?

In the present case a resolution was passed, requesting the board of public works to furnish a set of specifications upon which advertisements might be had, inviting bids for lighting a certain portion of the city. In response thereto such board prepared plans and specifications for the furnishing of 2,300 incandescent gasoline lamps to be maintained for the year 1903, and the common council approved of the specifications so reported, and also directed the city clerk to give notice in the official paper of the city of the intention to receive bids and award a contract for the furnishing and maintenance of such lights as provided by the plans and specifications. Such notice was given, and in response thereto three bids were received and reported to the council, and at an adjourned meeting the council passed a resolution rejecting the bid of the Western Street Lighting Company, which was the lowest bidder; and, upon motion, the bid of respondent company, the next lowest, was accepted, and the contract awarded to it.

The resolution rejecting the bid of the Western Street Lighting Company was not approved by the mayor, but at the expiration of five days became a law; and, in pursuance of the motion accepting the bid and awarding the contract to respondent company, the form of contract was subsequently approved by the board of aldermen and assembly, and duly signed by the presiding officers of each body, but at the commencement of this action had not yet been signed by the mayor and respondent company.

Attention is called to the fact that the common council approved the semi-annual report of the board of public works, and by formal resolution directed the maintenance of the lamps therein specified, pursuant to section 71, tit. 3, c. 6; and it is submitted that the several resolutions referred to are the only necessary prerequisites, basic in character, defining the necessity for the lights and the determination of the city to maintain them, and in that respect was a compliance with the requirement calling for the lighting of the city by resolution. The argument fails for the reason that the several resolutions referred to deal only with those preliminary steps which lead up to the final and essential thing, the awarding of the contract. It would be remarkable if, in the scheme of government so elaborately planned to protect the public interest, the people should provide that in the preliminary matters of calling for specifications and bids the common council should be required to proceed by resolution, but, when the essential and critical act is reached—that which goes to the very essense of the subject—the safeguards should be removed, and the council be permitted to proceed and award the contract upon motion. Those duties prescribed by section 1 regarding the drafting of the contract, and its submission to the council for approval, and the signing thereof by the presiding officers of the assembly and the board of aldermen, city clerk and mayor, may be considered mere ministerial acts. While the section is not artistically drawn, it is evident that, after the bid is accepted and the contract authorized by the co-operation of the common council and mayor, all that remains to be done thereafter is formal in character, and for the purpose of insuring the execution of the contract in accordance with the terms of the award.

Assuming the contract was signed by the mayor, and that the parties have been operating under it for the current year, it does not follow that the act of attaching his signature had the effect of making it a legal instrument. The position of the mayor, under the provisions of chapter 4, as a necessary element in the consideration of those enactments which pertain to the government of the city, is quite different from his position as a mere ministerial officer in attaching his signature to the contract. If the contract in question was illegal for the reason stated, the mayor could not make it legal by his signature. If it did not meet with his approval, it must have been again submitted to the consideration of the common council, and passed by a four-fifths vote, and the time had passed for such resubmission and

consideration. His refusal to attach his signature would not have the effect of resubmitting it to the council, to the same intents and purposes as though returned with his veto during the course of the proceedings.

The conclusion follows that the action of the common council in awarding the contract to respondent company was without authority and void, and for this reason the judgment of the court below must be reversed. So ordered.

III. Letting of Contracts [4]

CHIPPEWA BRIDGE CO v. CITY OF DURAND.

(Supreme Court of Wisconsin, 1904. 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.)

Action by the Chippewa Bridge Company against the city of Durand and others. Judgment for defendants, and plaintiff appeals.

Taxpayer's action to prevent an alleged unlawful use of public funds. Plaintiff is a private corporation organized under the laws of Wisconsin. Defendant city of Durand is a municipal corporation organized and existing under chapter 252, p. 1039, Laws of such state for 1887 and the acts amendatory thereof. The city, at the times herein mentioned, possessed authority under chapter 430, p. 611, Laws of Wisconsin for 1901, to construct a bridge across the Chippewa river, and prior to the proceedings hereafter mentioned to that end the city duly procured and had in its treasury for that purpose $25,000. The city purchased material for a draw span for such bridge from the American Bridge Company, and let a contract for the superstructure of the bridge to such company, and also a contract for the substructure of the bridge to said Business Men's League.

The common council approved of a contract with the American Bridge Company for the superstructure December 30, 1901, and ordered the mayor to execute such contract. That was accordingly done, January 3, 1902. January 13, 1902, a bid of the Business Men's League aforesaid, for the substructure, was accepted, and a contract executed accordingly. Bonds were given to secure the performance of both contracts in accordance with the charter, except that bonds did not in any case accompany the bids, nor was any requirement in that regard made by the council as the charter provides. The mayor sent a communication to five bridge companies, soliciting bids for the superstructure, which included the use of a

[4] For discussion of principles, see Cooley, Mun. Corp. § 74.

draw span to be furnished and delivered by the city, the same to be put in place and adapted to being a part of the bridge by the contractor.

The communication contained a diagram showing in a general way the characteristics of the span to be used, and information to the following effect: Four of such spans will be required. Each bidder will be permitted to arrange details to suit its own manufacturing facilities, subject to the general specifications and subject to the approval of the city engineer. The bid in each case should include the expense of putting in place the draw span furnished by the city. Bids for the complete work are to be preferred. The steelwork must be painted as indicated. The structure will not include bed joists, planking, guard rails or substructure. All bids should be sent to the writer by December 16, 1901. The right to reject any and all bids is reserved. The contract will be awarded to the lowest responsible bidder. The terms of payment will be cash upon acceptance of the work.

There was no other solicitation for bids for the superstructure except some orally made by the mayor and the city engineer to two of the bridge companies, one of whom obtained the contract. Prior to December 17, 1901, at which time there was a meeting of the common council, bids had been received in response to the communication aforesaid, as follows: American Bridge Company, $16,625; King Bridge Company, $14,000 and 20 per cent. on cost of erecting draw; Waukesha Bridge Company, $15,630. No action was taken thereon December 17th. Thereafter the American Bridge Company, by oral communication and by negotiation, reduced its bid to $15,000, and concessions were made to it. No action was taken by the common council as to auditing any of the claims for payment under the contract. The contract actually awarded to the American Bridge Company varied in several material particulars from the terms stated in the mayor's communication aforesaid. There was considerable evidence tending to show that the officers of the city were active, after this action was commenced, in placing the money designed for payment for the bridge, beyond the reach of any judgment or order which the court might make in respect thereto interfering with the purpose of such officers.

MARSHALL, J.[5] * * * Appellant's case depends primarily upon whether the word "work" in section 13, subchapter 4, of the respondent city's charter (chapter 252, p. 1057, Laws 1887), is limited to the mere exercise of human energy, with or without the use of appliances to render the same efficient, instead of extending to the products of such energy, such as a bridge, a building, or any one of a great many things that might be mentioned, not mere matters of merchandise. The lexical meaning of the word covers both,

[5] The statement of facts is rewritten and part of the opinion is omitted.

though the former is the more common meaning. Mere physical or mental exertion to accomplish an end is work; so is that upon which one labors, and also that produced thereby. Webster's Dict. That the word includes the latter meaning in the law in question hardly admits of reasonable controversy. The language of such law is as follows:

"All contracts for work ordered by the common council of said city, the expense whereof shall exceed the sum of fifty dollars, shall be let to the lowest reasonable and responsible bidder who shall have complied with the requirements hereinafter set forth."

One of the most familiar rules for judicial construction would require the word "work" as thus used to include the products of work other than mere merchandise, if there were any ambiguity in respect thereto calling for judicial construction, which is doubtful. Judicial interpretation or construction never legitimately begins except at the point where certainty so far ends that two or more reasonable meanings are apparent. "The effect and consequences, and the reason and spirit" of an enactment are to be looked to in solving any ambiguity therein, and are to prevail within the reasonable scope of the language used if the legislative purpose in that regard can be fairly said to be therein expressed. Harrington v. Smith, 28 Wis. 43; Wisconsin Industrial School for Girls v. Clark Co., 103 Wis. 651, 79 N. W. 422. The reason for such enactments as the one in question is, in the main, to preclude public officers from making contracts in such a way as to enable them to sacrifice the public interests to satisfy favoritism, mere improvidence, or to a corrupt desire for private gain. There is no better safeguard against infidelity of officials in that respect, yet discovered, than to require municipal contracts to be publicly let, the scope of the service to be performed and the terms of payment being so definitely mapped out in advance as to enable persons experienced in respect thereto to estimate with reasonable certainty the actual cost thereof, and to require the award to be made without change in such service or terms. A requirement of that kind forms part of the governmental system of nearly every political organization from the nation itself down to the minor governmental agencies in towns.

Obviously, to restrict the meaning of the word "work" in the law in question to the mere expenditure of physical or mental energy to some municipal end, would violate the manifest policy thereof. It is far more important to public interests to require the construction of buildings, bridges and other structures needed by municipalities to be contracted for according to the merits of competitive offers, than to require mere work to be so contracted for. The term in question, in such statutes as we have here, is commonly regarded as referring more properly to the former than to the latter, and without room for reasonable controversy. Very few instances can be found

in the books where courts have been called upon to make any declaration in the matter. In Ricketson v. Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685, "work" in a somewhat similar provision to the one under consideration, was, without discussion, treated as including the construction of a crematory. True, in the Milwaukee city charter it was coupled with the word "improvements" at one point, but at others it was used as inclusive thereof. In the directions for letting the contract it was used alone, manifestly as covering buildings, bridges and all structures required by the municipality. In State ex rel. Dunn v. Barlow, 48 Mo. 17, Mazet v. Pittsburgh, 137 Pa. 548, 20 Atl. 693, American Pavement Co. v. Wagner, 139 Pa. 623, 21 Atl. 160, and many other cases that might be referred to, such word in similar laws is spoken of as synonymous with works, structures of some kind. In the charter of respondent it obviously includes that meaning.

In addition to what has been stated as to the manner in which public work is required to be contracted for under the charter of respondent city, there is the following in the section before referred to: "All bids and proposals shall be sealed and directed to the common council, and shall be accompanied with a bond to the city in a penal sum equal to the amount of the bid, which bond shall be signed by the bidder and by a responsible surety, who shall justify that he is worth the sum mentioned in such bond over and above all debts, liabilities and exemptions; such bond shall be conditioned that such bidder will execute a contract at such time as the common council shall require, with satisfactory sureties, to perform the work specified."

Power to make the contracts in question at all was dependent upon a substantial compliance with all the quoted provisions. Ricketson v. Milwaukee, supra. If they were made in any other way, they constituted no warrant for the disbursement of public money for the structure obtained thereby, nor did the furnishing thereof, whether in good faith or bad faith, or whether the city in fact obtained a good bargain or not, of itself constitute a defense to this taxpayer's action to prevent payment of public money to the respondent bridge company and Business Men's League; nor can such furnishing prevent the rendition of a judgment against them and the officers who participated in transferring possession of the money illegally from the city treasury to them for a restoration thereof to such treasury. Frederick v. Douglas Co., 96 Wis. 411, 71 N. W. 798; Ricketson v. Milwaukee, supra; Mueller v. Eau Claire Co., 108 Wis. 304, 84 N. W. 430; City Improvement Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; McCloud v. Columbus, 54 Ohio St. 439, 44 N. E. 95; Addis v. Pittsburgh, 85 Pa. 379; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McDermott v. Jersey City, 56 N. J. Law, 273, 28 Atl. 424; Brady v. New York, 20 N. Y. 312; Board of Supervisors v. Ellis, 59 N. Y. 620; McDonald v. Mayor.

68 N. Y. 23, 23 Am. Rep. 144; Dickinson v. Poughkeepsie, 75 N. Y. 65; East River G. L. Co. v. Donnelly, 93 N. Y. 557; Lyddy v. Long Island, 104 N. Y. 218, 10 N. E. 155; People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; Wickwire v. Elkhart, 144 Ind. 305, 43 N. E. 216; Platter v. Board, etc., 103 Ind. 360, 2 N. E. 544.

The rule of the New York cases above cited was approved in Wells v. Burnham, 20 Wis. 112. True, there is a conflict of authorities as to the responsibility of a municipality to pay for property obtained through an invalid contract and of the recipients of money thereon to restore the same, some holding that a contract, though not in all essentials made according to law if within the power of the municipality, and fairly made, except for the departure from established procedure, cannot be impeached after the performance thereof and acceptance of the work, and some holding, in the circumstances stated, that though no recovery can be had upon the contract, there may be quantum meruit. However, the general rule is that a municipality is without authority to make a contract having any vitality whatever otherwise than for the objects and in the manner prescribed by law, and that one in form entered into in any other manner than substantially that provided by law, where the provisions in that regard are coupled with a prohibition to otherwise contract, imposes no liability on the municipality even though it is performed by the opposite party. In People v. Gleason, supra, it was held, that a contract thus prohibited is fundamentally illegal; that the common council of a city has no jurisdiction to audit and allow a claim thereunder or to recognize it as having any vitality whatever. * * *

Before testing the finding of the court by the evidence, as to whether the charter requisites to the validity of the contract were complied with, we will endeavor to state clearly what those requisites were. First in order is the one requiring the work to be let to the lowest reasonable and responsible bidder. The charter contains no express direction as to the manner of calling for bids or giving the necessary information to enable persons desiring to enter the competition to do so intelligently, each having in mind the same character of work and terms. Many charters contain such express direction. In such circumstances it has been uniformly held that failure to call for bids in the prescribed way or to provide plans and specifications for the work within the convenient reach of bidders, is fatal to the proceeding. Ricketson v. Milwaukee, supra. State ex rel. Dunn v. Barlow, supra. When the manner prescribed for letting public contracts includes the element of competition between rival bidders and cannot be executed in spirit without reasonably definite plans and specifications for the proposed work being provided for the use of bidders and a notice being given of the facts in some way reasonably calculated to attract the attention of all persons liable to desire to enter the competition if given an oppor-

tunity to do so, then such requirements should be regarded as a part of the law by necessary implication. In Mazet v. Pittsburgh, supra, it was held that a requirement for public work to be let to the "lowest bidder necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared, specifications of the work to be done and materials to be furnished, etc., specifications freely accessible to all who may desire to compete for the contract and upon which alone their respective bids must be based."

We indorse that. This court in effect so held in Kneeland v. Milwaukee, 18 Wis. 411, and Kneeland v. Furlong, 20 Wis. 441. In the latter case the placing of proper plans and specifications within the convenient reach of bidders so as to enable them to act intelligently in respect to the proposed work, each making an offer to produce the particular desired result was held to be a matter of the highest importance. "The want of proper and certain information," said the court, "must always tend to discourage bidders and prevent fair competition." Otherwise, a law merely requiring public work to be let to the lowest reasonable and responsible bidder would be ineffective. Such a law clearly, by implication, contains substantially what was expressed in the charter, compliance with which was deemed to be vital to the contract in Ricketson v. Milwaukee, supra. As there held, such a provision contemplates that "the bidders shall start on a common ground and bid for the production or accomplishment of the same identical result." In harmony with that, we hold that the charter in question required, as an essential to the validity of the contracts for the bridge, the preparation of proper plans and specifications for those parts of the bridge proposed to be let separately, the placing thereof within convenient reach of all desiring to consult the same for the purpose of bidding for the work, and the giving of public notice in some way reasonably appropriate to reach all persons likely to desire to participate in the competition.

A second essential contained in the charter is that the plans and specifications and terms, submitted as a basis for the bids, shall not be changed except in such manner as to affect all bidders and persons desiring to bid alike; that in case of a substantial change, either in the character of the structure or the terms of the proposed contract after the first competition shall have been completed, there shall be a second opportunity given to bid upon the new basis. Wells v. Burnham, supra; McDermott v. Jersey City, 56 N. J. Law, 273, 28 Atl. 424. To permit one person to change his offer in consideration of a variation in the plans and specifications or proposed terms, and to award to him the contract as a result thereof, is the plainest kind of a violation of such a law as the one in question. An award made to a particular bidder through negotiations with him, the work to be done or the terms of the contract being privately

varied upon the one side to secure a reduction in the offer to do the work upon the other, is not a letting to the lowest bidder upon an open competition. On the contrary, it is an award of work privately made upon special terms to produce something not submitted to public competition. Shaw v. Trenton, 49 N. J. Law, 339, 12 Atl. 902; Tiedeman on Mun. Corp. 173.

A provision for public contracts to be let to the lowest reasonable and responsible bidder, executed reserving power to reject any and all bids, requires the governing board to take up the bids for the work and consider them judicially. It does not permit arbitrary rejection of bids, nor arbitrary preference of one bid over another which is lower. Having determined, in the manner indicated, which of the several bids is the lowest and most reasonable of those made by responsible parties to do the thing proposed in the manner and upon the terms specified, and that there is no good reason for rejecting all bids and throwing the matter open to a second competition, the governing body should award the contract. Beach on Public Corp'ns, 698. The law permits no private negotiations with an individual bidder, no change of plans and specifications submitted for the competition, no variance for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality, as any proceeding requiring the exercise of quasi judicial authority. Municipal officers, in the execution of such a law, must necessarily exercise the judicial function to a certain extent, acting between the corporation and the bidders, and between bidders.

A third essential of the charter is that all bids shall be sent to the city council under seal. That implies that the bids are to be opened in the presence of the council, and all so treated at the same time and when they are taken up for consideration, thus in a measure precluding publicity as to the contents of the respective bids and opportunity for collusion between bidders, and negotiations between members of the council and bidders.

A fourth essential of the charter is that each bid shall be accompanied with a bond as before indicated.

In the light of what has been said and the evidence found in the record, we are at a loss to understand upon what theory it could have been held that the charter of the respondent city was substantially complied with in the making of the contracts in question. Appellant's counsel insist, upon good grounds, that the finding is not supported by the law or the evidence. It seems probable that the true basis thereof is disclosed in the idea expressed in connection therewith, that in awarding the contract the council proceeded in the manner best calculated to secure competition in bidding, and in the customary manner of letting contracts for such work to the lowest reasonable and responsible bidder. That is, as we take it, that or-

dinarily in letting public work to the lowest reasonable and responsible bidder, the right to reject any and all bids being reserved, after some basis of actual cost has been obtained by the submission of numerous bids, private negotiations are resorted to for the purpose of making the best possible bargain, and that in such negotiations it is customary to give and take, each side striving by minor concessions to obtain major advantages. That may be true as regards private contracts, though it is doubtful; but manifestly, no such proceedings can be justified as regards public contracts where the law specifically directs the steps to be taken.

The circuit court must have used the term "substantial compliance" with reference to the actual results obtained instead of the essential steps required by the charter in the making of such contracts, the idea being that the purpose of such steps is to obtain the best results practicable for the corporation, and that, if such results were in fact obtained, then the charter was substantially complied with. If so, a mistake of law was very clearly committed. It may be that, in the particular case, the methods adopted by the city officers to procure the bridge were advantageous to the public; but that does not help the matter. The charter having prescribed how such contracts must be made, having mapped out, expressly or by implication, a particular plan to be followed in order to prevent dickering, which, if allowed to be resorted to in such matters, is liable to result in favoritism, extravagance or corruption, the municipal officers were under an absolute disability to proceed in any other way.

So, while it may be true that in the particular case before us the best results obtainable were secured, and if that were to be taken as warranting the finding of substantial compliance, it could be sustained, manifestly, it is not the test, nor a circumstance that counts in a contest of this kind. There is no such thing known to the law as substantial compliance with the prescribed method for making public contracts, other than performance, in substance, of every condition precedent to such making, regardless of whether the results finally obtained could have been reached in the particular instance in a more economical manner or not.

The evidence is undisputed that the draw span of the bridge, a very material part, was obtained by private contract in violation of the express prohibition in the charter; that the substructure was obtained in substantially the same way; that the only invitation for bids on the superstructure was by letters addressed by the mayor to several bridge companies; that there was no general invitation or opportunity given to men engaged in the business of constructing bridges to bid on the work; that the letter sent to the few favored bridge companies did not confine the bidders to a competition to produce the same particular result; that each was permitted to vary the details of the work to suit his own notions and convenience; that

the charter requirement as to all bids being directed to the common council under seal and accompanied by a bond was entirely omitted from the invitation, and from the offers made by bidders; that there was no adjudication by the council upon bids submitted, as the charter requires; that the contract made did not accord with any bid submitted, formally, or with the invitation for bids; and that it was made as the result of negotiations between the city officers and the bridge company, the price of the work and the terms of payment being materially changed from what other bidders had the opportunity of considering. A more flagrant disregard of the provisions of a city charter in respect to such matters it would be hard to find in any of the large number of cases reported in the books touching such question. That the contracts were utterly void and furnished no justification for turning over public money to the respondent bridge company and the respondent members of the Business Men's League, is too manifest to require further discussion. * * * Reversed.

DIAMOND v. CITY OF MANKATO et al.

(Supreme Court of Minnesota, 1903. 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448.)

Action by John Diamond against the city of Mankato and others. Findings for plaintiff. From an order denying a new trial, defendants appeal.

START, C. J.[6] The plaintiff is a taxpayer of the city of Mankato, and the owner of land fronting on that portion of Broad street lying between Lincoln and Vine streets, in the city, which the proper municipal officers determined to pave with asphalt. He brought this action to restrain such officials from entering into any contract on behalf of the city for the making of such improvement. * * *

3. The trial court also found: "That there is asphaltum other than Pitch Lake and Bermudez asphaltum as available, and equally as good for paving purposes, as Pitch Lake and Bermudez asphaltum, and that there are persons, firms, or corporations seeking contracts for paving streets in Minnesota and elsewhere who use in such work asphaltum other than Pitch Lake or Bermudez asphaltum, and who cannot procure Pitch Lake or Bermudez asphaltum. That by limiting the asphaltum to be used in said improvement to Pitch Lake and Bermudez asphaltum, and by other restrictions and provisions in the specifications therefor, and by the changes and alterations made in said specifications by the officers of defendant city, as herein found, fair competition in bidding upon the contract for said improvement was prevented and excluded, and firms who wished to, and would, have filed bids therefor, were prohibited

[6] Part of the opinion is omitted.

from so doing." And, further, that the contract was null and void as against the city. If this finding and conclusion are supported by the evidence, it necessarily leads to an affirmance, notwithstanding the trial court's finding on the question of the necessity for initiating the improvement is not justified by the evidence. The question is, then, whether the finding of the facts upon which the conclusion is based is manifestly and palpably against the weight of the evidence.

The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefor must be so framed as to permit free and full competition. Nor can they enter into a contract with the best bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited. The contract must be the contract offered to the lowest responsible bidder by advertisement. Nash v. St. Paul, 11 Minn. 174 (Gil. 110); Schiffmann v. St. Paul, 88 Minn. 43, 92 N. W. 503; Wickware v. Elkhart, 144 Ind. 305, 43 N. E. 216; Dickinson v. Poughkeepsie, 75 N. Y. 65; 20 Amer. & Eng. Ency. Law, 1165–1169. This rule should be strictly enforced by the courts, for if the lowest bidder may by an arrangement with the municipal authorities have incorporated into his formal contract new provisions beneficial to him, or have onerous ones excluded therefrom which were in the specifications upon which bids were invited, it would emasculate the whole system of competitive bidding. It would also lead to abuses by opening wide the door of opportunity to award the contract to a favorite or generous contractor—generous at the cost of the taxpayer. To secure such a result it would only be necessary to make the terms and specifications upon which bids were invited burdensome for bidders, and for the favored one to make his bid upon the secret understanding that such terms would be modified in making the formal contract.

In this case the evidence does not justify the conclusion that there was any such secret understanding, or that the municipal authorities acted corruptly in the premises. If, however, the forbidden act was in fact done, the contract is void without reference to the intent with which it was done, for the purpose of the rule is to secure fair competition upon equal terms to all bidders, and to remove all temptation for collusion, and opportunity for gain at the expense of the property owners by the municipal authorities.

We come now to the consideration of the evidence in the light of this rule. The street was to be paved with asphalt. The city charter required that the municipal authorities should advertise for bids for the doing of the work on the basis of the plans and specifications, and award the contract to the lowest reliable bidder. This action was commenced March 31, 1902. A temporary injunction to restrain the municipal authorities from entering into the contract for the paving of the street was prayed for in the complaint. The municipal authorities,

on March 17, 1902, invited by a proper advertisement sealed bids for doing the work, upon the basis of the specification, to be filed on or before April 2d. On April 18th the temporary injunction was issued, and served on April 23d, and on the same day the formal contract was entered into. The specifications for the improvement limit the kind of asphalt to be used to Trinidad "Pitch Lake" asphaltum obtained from the "Pitch Lake" in the Island of Trinidad, or Bermudez asphaltum. The evidence does not justify the conclusion that there was a monopoly of either Pitch Lake or Bermudez asphaltum. But the evidence, although conflicting, tends to show that there was other Trinidad asphaltum just as good, and that the formula prescribed in the specifications for the making of the pavement was applicable only to Trinidad Pitch Lake asphaltum, and that for this reason contractors were deterred from bidding on the work. The specifications contained a provision to the effect that the city should not be liable for any delay or stoppage of the work by reason of any injunction or legal proceedings whatever, and a further one to the effect that a penalty of $20 per day would be exacted for every day's delay in finishing the work after August 1, 1902. The contract was changed by adding the words, "providing such failure or delay is not through unavoidable causes."

The evidence tends to show that at least one party was deterred from bidding on the work by reason of these provisions in the specifications. In view of the pendency of the action and the opposition of the property owners to the improvement, they were well calculated to deter bidders, unless they added a substantial sum to the amount they would have otherwise named in their bids for the loss they might incur by reason of these provisions of the specifications. Again, the evidence shows that by the specifications payments for the work should not be made earlier than 120 days after the completion and acceptance of the work, out of money received from assessments duly made on account of the improvement; and that the time of payment was changed in the contract, so that payment of the work should be made, after the completion and acceptance thereof, out of assessments therefor on property benefited thereby other than that owned by the city. This difference in the time—some four months—for the payment of the contract price was substantial, and was manifestly for the benefit of the contractor, as the evidence shows that the estimated cost of the work was over $50,000. But this advantage was not offered to other bidders by the invitation to bid on the basis of the specifications. The evidence tends to show that in other material respects the specifications were not followed in the contract, and that the changes were beneficial to the contractor. Upon the whole evidence, we are of the opinion that the finding in question is fairly sustained by the evidence, and we accordingly hold that the contract was void.

There are several assignments of error as to the finding and conclusion of the trial court with reference to the paving of the intersections

of the street. We do not consider them, for the reason that they are immaterial in view of the ground upon which we sustain the conclusion of the trial court that the contract is void. Order affirmed.[7]

IV. Term and Duration of Contract—Power to Bind Successors [8]

WESTMINSTER WATER CO. v. CITY OF WESTMINSTER.

(Court of Appeals of Maryland. 1904. 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424.)

Petition by the Westminster Water Company against the mayor and common council of the city of Westminster for mandamus. Application denied, and the company appeals.

McSHERRY, C. J.[9] This is an appeal from the circuit court for Carroll county, and was taken from an order refusing to grant a writ of mandamus which had been asked for by the appellant against the appellee. The facts which are necessary to be stated are as follows:

By chapter 88, p. 136, of the Acts of the General Assembly of 1876, it was provided that "the mayor and common council of Westminster may levy annually a tax not exceeding five cents on every $100 to be used and applied to the payment of water rents for the use of water for the public uses of said city, that is to say, for use on the public streets of said city, and for the suppression of fires, to any incorporated company which may be organized for the introduction of a supply of water into said city; and the said mayor and common council may contract with any such incorporated or to be incorporated company for the introduction of water into the said city, to pay such company annually in such sum not exceeding the proceeds of said levy of five cents as aforesaid, as the said mayor and common council may deem proper, provided that no such payment shall be made until water shall have been actually introduced into said city by such company; and provided further that said levy of five cents as aforesaid shall not be made or used and applied for any other purposes whatsoever." On May 12, 1883, the mayor and council of Westminster passed an ordinance known as No. 62, wherein, amongst other things, it was provided that when mains of the size and length described in the ordinance "shall be laid through the streets and alleys of the city of Westminster with water therein suitable and sufficient for fire extinguishing, street sprinkling and domestic purposes, by the West-

[7] Compare City of Mankato v. Barber Asphalt Pav. Co., 142 Fed. 329, 73 C. C. A. 439 (1905).

[8] For discussion of principles, see Cooley, Mun. Corp. § 76.

[9] Part of the opinion is omitted.

minster Water Company, a body corporate of Carroll county, then and in that event the mayor and common council of Westminster shall annually levy and pay to the said water company the sum of five cents on each $100 of the assessed value of all property within the limits of the said city subject to the levy and taxation by said city whatever the sum may be, less one-third of the expenses of collecting said water taxes each year. Provided that the amount of the said tax to be paid said company in any one year shall not be lower than that produced by the valuation or assessment of the year 1883."

On the faith of the aforegoing and other terms of the ordinance, all of which were accepted by the water company, the latter expended large sums of money in erecting a plant, building reservoirs, laying mains, and erecting fire plugs in accordance with the provisions of the ordinance just named. The ordinance thus became the contract between the company and the city. On June 29, 1885, a supplemental agreement was entered into between the water company and the mayor and common council of Westminster, whereby some of the provisions of the contract made by Ordinance 62 were modified; but the terms of that supplemental agreement need not be stated, further than the one we shall now quote, namely: "Now therefore for the purpose of rendering said ordinance clearer and to avoid any future misunderstanding concerning it, this agreement is now entered into by the said contracting parties to bind them and their successors in office forever, as follows." There are further provisions, which we have said it was unnecessary to quote in this opinion. The tax was levied annually and paid to the water company under the provisions of Ordinance 62 and the supplemental agreement just alluded to, until the year 1902, when the mayor and common council passed an ordinance (No. 145) repealing Ordinance No. 62, and declaring that "the contract in said ordinance with the Westminster Water Company is hereby repealed and terminated," and in making the levy for the year 1902 the mayor and common council omitted to levy for the use of the Westminster Water Company the sum of 5 cents on each $100 of the assessed value of the property within the limits of the city, as previously levied under the Ordinance No. 62 and the supplemental agreement referred to. Thereupon the pending petition for a mandamus requiring the mayor and council of Westminster to make the levy of 5 cents for the use of the Westminster Water Company was filed. * * *

It has been more than once held by this court, following the English doctrine, that the writ of mandamus is not one which is granted ex debito justitiæ. State v. Latrobe, 81 Md. 222, 31 Atl. 788. There must be a clear and unequivocal legal right to be enforced, and there must not be any adequate remedy other than mandamus for its enforcement. Brown v. Bragunier, 79 Md. 234, 29 Atl. 7. If the right be doubtful, mandamus will not lie. If the right be clear, and there be some other adequate remedy, that remedy, and not mandamus,

must be invoked. Obviously, then, the inquiry at the threshold of the case is, is the right which the water company sets up and seeks to have enforced such a clear legal and unequivocal right as can be enforced by this process? Under the supplemental agreement it will be borne in mind that the contract of 1883 distinctly and unequivocally purports to bind both the municipality and the water company forever. The municipality is obligated to levy each year, in perpetuity, 5 cents on the $100 of the assessed value of the property within the city, and to pay the proceeds of the levy to the water company, in consideration for the latter's supplying from its works water for public uses.

There are two difficulties in the path of the enforcement of that contract by mandamus: First, it has been, as it must be, conceded that no municipality, without express legislative sanction, has authority to bind itself to levy taxes for the payment of money for all time to come, when the taxes, if thus levied, are to be applied as are those we are dealing with. Secondly, the inequality and the want of mutuality in the provision, which, without regard to varying circumstances that might arise in the future, fixes five cents as the rate to be levied each year, would of itself stamp the contract as one not creating such a clear and unequivocal legal right in the relator as to warrant the issuing of a mandamus for its enforcement.

First, starting with the postulate that without previous legislative sanction a contract of the kind we are considering cannot be made in perpetuity, because it would be ultra vires, it is argued that the true interpretation of the agreement is not that it was to continue or was designed to continue forever, but that it was meant to last for 40 years, and no longer, because that period was the limit of the corporate life of the water company; and it was vigorously and ably insisted that a contract of this character for 40 years, made under the circumstances we have narrated, was neither illegal nor unreasonable. Now, it is true the books are full of cases where contracts for the furnishing of water by water companies to municipalities, and running for quite a number of years, have been before the courts repeatedly for consideration. Thus, in the case of New Orleans Waterworks Company v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525, a contract for 50 years was sustained; in Walla Walla v. Walla Walla Water Company, 172 U. S. 9, 19 Sup. Ct. 77, 43 L. Ed. 341, a contract for 25 years was sustained; in Vicksburg Water Company v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808, a contract for 30 years was held not unreasonable; and in Bennett Water Company v. Millvale, 200 Pa. 613, 50 Atl. 155, a contract for 20 years was upheld. Columbus Water Company v. Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354. But it will be noticed that in all of these, and similar cases which might be cited, there was a specific claim that a definite period of time had been distinctly agreed upon; and the question in some, though not in all, was whether that definite period was a reasonable one. * * *

In none of the foregoing cases was the situation presented with which we are confronted here. The nearest approach to the case at bar is the one last above cited. If this contract had been for 40 years, then the single question to be considered would be whether that was a reasonable time; but the contract, on its face, purports to run forever, and the argument is that inasmuch as the duration of the water company's charter was limited to 40 years, when the agreement was entered into, the contract, though professing to run forever, must be read as if it ran for 40 years, and no longer; and then, reading it in that way, we are asked to say that the 40 years would not be unreasonable. But the fallacy of the argument lies in this: that we must prescind from the contract the words that the parties to it have themselves deliberately incorporated therein, and we must then substitute for the words thus eliminated others that the contracting parties did not see fit to use, and obviously did not intend to use. That is to say, we must declare that the contract as made is one that is void because the parties were without power to enter into it, but, inasmuch as it is void on that ground, the court will by construction make a new one for them, though they did not see fit or intend to make it for themselves, so that when made by the court the new contract would be one that is valid, because when thus made it would run only for a reasonable time.

By what authority can the court limit the duration of the contract to a term of 40 years, when it was the declared intention of the parties to it that it should continue in force forever, as stated in and declared by the supplemental agreement, which was framed for the very purpose of making clear their object in this particular? Why say 40 years, now that the charter of the water company has been indefinitely extended by the act of 1900, c. 489, and obviously so extended to the end that the design of the contracting parties that the contract should remain operative for all time might be given effect? The extension of the charter of the water company is a circumstance not to be overlooked in determining what the parties understood to be the meaning of the original contract as to the period of time the agreement was to run. No case has been cited where the court has changed an ultra vires agreement into a valid undertaking, and we are not prepared to say that a court, upon an application for a mandamus, is at liberty, first, to declare void a contract under which the right to have a mandamus is asserted, and, secondly, in place of the void contract, to construct a valid one, in order that the writ may be issued. Until this can be legally done, the application as here presented must fail. * * * Affirmed.

V. Ultra Vires Contracts [10]

BELL v. KIRKLAND.

(Supreme Court of Minnesota, 1907. 102 Minn. 213, 113 N. W. 271, 13 L. R. A. [N. S.] 793, 120 Am. St. Rep. 621.)

Action by Daniel L. Bell against Edward J. Kirkland and another. Verdict for plaintiff. From an order denying a new trial, William H. Ulmer and John Wagener appeal.

JAGGARD, J.[11] Plaintiffs and respondents brought an action against defendants and appellants to recover the unpaid balance for materials furnished to one Kirkland to be used in the construction of the "Somerville sewer." Kirkland contracted to construct the sewer, and, as principal, signed an instrument in which the appellants joined as sureties, which purported to be a bond to the city of St. Paul conditioned for the performance of the contract, and for the payment for the labor and materials furnished in its execution. The total amount of the account was $6,286.30. The balance unpaid was $2,967.55. The amount of the bond was $59,200. The present is a test case. The court found for the plaintiffs. It found as facts, inter alia, that the course of the sewer carried it under property hereinafter more fully set forth as to which the city had acquired no right by condemnation or grant. This appeal was taken from an order denying defendant's motion for a new trial.

Defendants' essential argument is that, if the contract was ultra vires and void, so also was the bond, and that the agreement was shown to have been ultra vires and void. In the first place, the agreement required the construction of a sewer through property not owned by the city. "The sewer provided for in the contract was a main sewer of about 4,200 feet in length. It is cut into two almost equal parts by a railroad right of way and adjoining private property for 205 feet. It is proposed to construct it to the Mississippi river as an outlet. In connection with the latter proposition, it is argued that a sewer is of no value unless continuous, or unless it has an outlet. It cannot reach the river because the last 85 feet is owned by the United States government. The result was two disjointed pieces of sewer without an outlet. The significant fact is that the ultra vires part of the contract leaves the sewer valueless. A contract to construct a useless sewer in private property is beyond the power of the city." The invalidity appears upon the face of the contract. In the second place, defendants' argument proceeds, the contract was not entered

[10] For discussion of principles, see Cooley, Mun. Corp. §§ 77–79.

[11] Part of this opinion and all of the concurring opinion of Elliott, J., are omitted.

into in accordance with the mandatory provisions of the city charter. We have examined the record adduced in support of this contention. It may fairly be regarded as showing a failure to let the contract as required by the city charter. It is unnecessary to consider the details of this want of compliance. It was, in fact, made by the board of public works, the proper body. A valid preliminary order, a specification of the portion of its cost to be paid out of general funds and other essentials, may properly be conceded to have been wanting.

1. A proper preliminary consideration of the legal questions thus presented involves a brief reference to the attitude of the courts to the doctrine of ultra vires. That doctrine has been attacked with an earnestness amounting sometimes to asperity. "The doctrine of ultra vires is of very modern date and entirely the creation of the courts. There is no such thing as ultra vires in the case of a common-law corporation (Case of Sutton's Hospital, 10 Coke, 30, C.), and it is not enacted in any statute. It affords, perhaps, the most remarkable instance in the history of English jurisprudence of the making of law by the judges; and, having once been created, it is now probably saddled onto the backs of the courts, like Sinbad's 'Old Man of the Sea', not to be shaken off." 6 Cent. Law Jour. 3. "The reasoning (on the subject) involves a strange confusion of ideas." 2 Morawetz, Pub. Corp. 18, § 649. Judge Seymour D. Thompson regards the modern doctrine of ultra vires as a revolt against the ancient doctrine based on a species of moral reformation. His conclusion is "that the doctrine of ultra vires has no proper place in the law of private corporations, except in respect of contracts which are bad in themselves, the making of which is prohibited by considerations of public morality, of justice, or of a sound public policy, and which, therefore, stand upon such a footing that neither party can be regarded as innocent or blameless in entering into them." 28 Am. Law Rev. 398. And see 5 Thompson, Corp. § 5969.

In 9 Harv. Law Rev. p. 255, Mr. George Wharton Pepper combats —and we think successfully—the existence of any clear distinction between the principles of the earlier and of the present decisions or of inextricable confusion on the subject in the American reports. He recognizes, however, that "in modern times there has been a steady movement in the direction of enforcing unauthorized or prohibited contracts between the parties." The tendency to what Mr. Cooke (28 Am. Law Rev. 227) calls "the extinction of the doctrine" is certainly very marked. 11 Harv. Rev. 387; 14 Harv. Law Rev. 332; 13 Am. Law Rev. 661. After an exhaustive discussion of relevant authorities in Re Assignment Mut. Guaranty Fire Ins. Co. v. Barker, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149, Mr. Freeman concludes: "After a study of the cases upon the subject, the impression is forced upon us that the doctrine of ultra vires, as applied to the contracts of private corporations, has almost lost its meaning. The undermining

of the foundation upon which it has rested from its inception has proceeded simultaneously from different directions until the doctrine itself seems almost ready to fall of its own weight. The original rule that an ultra vires contract was illegal and void could give rise to no rights, nor be validated by any performance or application of the law of estoppel, has practically been erased from the law, for those courts which do not contradict it directly do so indirectly by their manner of applying it. An appeal to the public interest that private corporations should be restricted in the making of contracts to the scope of their granted powers is growing more and more ineffectual where the rights of persons innocently entering into ultra vires contracts with such corporations intervene."

With respect to contracts by municipal corporations, one current opinion is that: "The contract of corporations, whether public or private, stand on the same footing with contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable tc corporations as to individuals." Argenti v. City of San Francisco, 16 Cal. 256, 277. We incline, however, to accept the views of Judge Dillon on the subject, thus summarized by counsel for the defendants: "The general principle of law is settled beyond controversy that the agents, officers, or even the city council of municipal corporations cannot bind the corporation by any contract which is beyond the scope of its power. * * * The history of the workings of municipal bodies has demonstrated the salutary nature of this proposition, and it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the charter or other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void." Dillon, Mun. Corp. (4th Ed.) 457 (381). And see Mayor v. Ray, 19 Wall. 468, 22 L. Ed. 164; Newbery v. Fox, 37 Minn. 141, 33 N. W. 333, 5 Am. St. Rep. 830. There is, however, an unmistakable and proper tendency to apply to both classes of corporations the principle that "the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." Ohio R. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693.

2. It is to be kept in mind that the term "ultra vires" is used in many different senses. 8 Words & Phrases, 7165, 7166. Two different uses of the term were pointed out in Minn. Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310, three in Bissell v. M., etc., R. R. Co., 22 N. Y. 258, and four in Green's Brice's Ultra Vires, 33–35. For present purposes, it suffices to refer especially to two different meanings. The first of these describes a contract which is not within the scope of the powers of a corporation to make under any circumstances, or for any purposes; for example: "Where a corporation

authorized only to build a railroad engages in banking." Mitchell, J., in Minn. Thresher Co. v. Langdon, 44 Minn. 41, 46 N. W. 312. "Where the Legislature, for instance, having authorized you to make a railway, you cannot go and make a harbor." Kindersley, V. C., in Earl of Shrewsbury v. North Staffordshire Ry. Co., 35 L. J. Ch. 156, 172. So, in the cases to which defendant refers us, it was held to be wholly outside of a city's power to "surrender control over streets" (State v. Minn. Transf. Ry. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656); to pay money to aid in building a shoe factory within its limits (City v. Hedman, 53 Minn. 525, 55 N. W. 737); to aid in the construction of a dam for the purpose of improving a private water power (Coates v. Campbell, 37 Minn. 498, 35 N. W. 366); to construct a building for the use of another municipality or other third person (Borough v. Sibley, 28 Minn. 515, 11 N. W. 91; Village v. County of McLeod, 40 Minn. 44, 41 N. W. 239); or without authority to buy real estate (Bazille v. Commissioners, 71 Minn. 198, 73 N. W. 845). For further illustrations, see Ingersoll on Public Corporations, 292, 293.

The second of these meanings refers to contracts of a class which the corporation had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power "in some particular or through some undisclosed circumstance" affecting the individual contract in issue. The former class is ultra vires in the primary, and really only proper use of the term, while in the second it is merely secondary. Mitchell, J., in Minn. Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310. That is to say, an ultra vires municipal contract, in its true sense, is a contract relating to matters wholly outside the charter powers of a corporation. 2 Dillon, Mun. Corp. §§ 935, 936. In Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 578, 99 Am. Dec. 30, Sawyer, C. J., justly remarked: "These distinctions must be constantly borne in mind when considering a question arising out of dealings with a corporation. When an act is ultra vires in the first sense mentioned, it is generally, if not always, void in toto, and the corporation may avail itself of the plea. But, when it is ultra vires in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case." And see City of Valparaiso v. Water Co., 30 Ind. App. 316, 65 N. E. 1063; Rogers v. City of Omaha, 76 Neb. 187, 107 N. W. 214; 5 Thompson, Corps. §§ 5975, 5976, 5977; Dillon, Mun. Corp. § 936; 2 Current Law, 977.

3. The inquiry naturally arises as to the sense in which the present contract is ultra vires. In the first place, it is ultra vires in the secondary and restricted sense only. The city had the undoubted charter power to contract for the construction of a sewer. So to do was strictly within the object of the creation of the corporation. That was

a familiar and necessary part of its function in government. The contract was not of the class of contracts which are void for want of legal capacity on the part of the city to make them. On the contrary, it was such a one as the city could properly have made although it may be admitted that this particular contract it ought not to have made. It is not at all such a contract as is prohibited by statute or public morals, any more than by its subject-matter. If the officers executing it had been regularly authorized, and if consent of the owners of all premises through which it was to run had been obtained, it would unquestionably have been a valid contract.

In the second place, the present contract is ultra vires, if at all, as to a small part only. It is convenient to postpone the consideration of irregularities in the letting of the contract, and to here refer only to the failure of the city to condemn. So far as that failure is addressed to private property, which the city could have condemned, the controversy is disposed of by the ruling in Keough v. St. Paul, 66 Minn. 114, 68 N. W. 843. It was there held that the contract for grading a street is not ultra vires, because the council has omitted to establish gradient lines, nor because condemnation proceedings have not been consummated. In the last analysis, however, defendants rely on the fact that the outlet of the sewer, to the extent of 85 feet, was owned by the government, and that the contract was beyond the power of the city, because it involved the commission of a trespass. In this connection we are cited to Sang v. City of Duluth, 58 Minn. 82, 59 N. W. 878. It was there held that a contractor could not recover loss of profits because the city had not acquired the right of way across the property of a railway company for a street which he undertook to grade, pave, and otherwise improve. As to such a part of the contract, it was held to be ultra vires. It was said in that case: "Plaintiff does not claim to recover for any work so performed, but claims loss of profits for being prevented from performing on the railroad right of way and loss by depreciation of materials purchased for that part of the work." That case is obviously not at all inconsistent with authorities holding that "an entire contract is not invalid because part thereof is ultra vires. * * *" A court should not destroy a contract made by parties further than some good reason requires. Elliott, Mun. Corps. § 291. And see Ill. Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Spier v. Kalamazoo, 138 Mich. 652, 101 N. W. 846, 2 Curr. Law, 977, notes 82, 83. The decision most nearly similar to the case at bar in this connection which we have been able to find is Coit v. City of Grand Rapids, 115 Mich. 493, 73 N. W. 811. This is the rule. That a contract void as to an inconsiderable or insignificant part is as to the rest valid is only one of its applications.

In the third place, the features of this contract objected to remain ultra vires in this restricted sense and to this limited extent, only so

far as is possible with respect to an executed contract. The learned trial judge in his memorandum said: "The city paid large sums of money upon this contract to the defendant Kirkland as the work progressed. One of these sureties received one of these payments. Neither of Kirkland's sureties can lawfully plead that the contract between the city and Kirkland is ultra vires because so far as either of them is interested, and so far as concerns this case, the contract has been fully performed. Where an ultra vires contract has been fully performed by both parties, it is justly held that it is no longer assailable by either. Note In re Mutual Ins. Co., 70 Am. St. Rep. 166." And see 2 Morawetz, P. C. § 689; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85, collecting cases at 285.

The learned trial judge proceeds: "The above treats of contracts with private corporations, but it is applicable in this case where the rights of the municipal corporation are not involved." In the leading case of Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, Mr. Justice Strong approves of the following rule laid down in State Board v. Street Railway Co., 47 Ind. 407, 17 Am. Rep. 702, in an action against a municipal corporation: "Although there may be a defect of power in a corporation to make a contract, yet, if the contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." This was followed and approved in City of East St. Louis v. Gas Light Co., 98 Ill. 415, 38 Am. Rep. 97. In Argenti v. City of San Francisco, 16 Cal. 256, after elaborate examination of the authorities, recovery on an executed contract with the city was allowed, although there was no evidence that the officer who signed them was expressly authorized. To the same effect are Rogers v. City of Omaha, 76 Neb. 187, 107 N. W. 214; Bodewig v. Port Huron, 141 Mich. 564, 104 N. W. 769; Lines v. Village Otego (Sup.) 91 N. Y. Supp. 785; Wilkins v. Mayor, 30 N. Y. Supp. 424, 9 Misc. Rep. 610; City of Tyler v. Jester, 97 Tex. 344, 78 S. W. 1058; City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063 (a particularly well-considered case); City of Fergus Falls v. Hotel Co., 80 Minn. 165, 83 N. W. 54, 50 L. R. A. 170, 81 Am. St. Rep. 249.

We have referred to these considerations to make plain the restricted sense and extent of the ultra vires aspect of this contract and its executed character, as well as the trend of judicial decision concerning the legal position of plaintiff's contract. The facts that as to a small portion of a contract with a municipality only it was ultra vires in any sense, and that it has been substantially executed by the parties basing rights of action upon it, are strong, if not conclusive, considerations for refusing to hold it absolutely void. It is, however, unnecessary, and because of the course the argument

has taken in this court, undesirable, to determine whether the contract was valid in the sense that the contractor could have recovered on it from the city. * * * Affirmed.

VI. Same—Ratification and Estoppel [12]

CITY OF FERGUS FALLS v. FERGUS FALLS HOTEL CO.

(Supreme Court of Minnesota, 1900. 80 Minn. 165, 83 N. W. 54, 50 L. R. A. 170, 81 Am. St. Rep. 249.)

LEWIS, J. Action by respondent city to foreclose a mortgage upon certain hotel property in the city of Fergus Falls. Defense, that the city cannot maintain an action to enforce securities taken on a loan, the same being void, against public policy, and ultra vires. The action was tried by the court without a jury, and resulted in an order for judgment in favor of respondent. Defendant appeals from an order denying its motion for a new trial.

The trial court found that in 1890 one Bell and wife executed and delivered to the First National Bank of Fergus Falls their promissory note for $10,000, due five years from date, with interest at 2 per cent., and at the same time, to secure the note, executed and delivered a mortgage upon certain premises in Fergus Falls known as the "Grand Hotel Property." This mortgage was duly recorded, and contained the usual covenants for foreclosure upon default of payment. The amount of the consideration of the mortgage—$10,000—was paid to Bell by certain officers of the city of Fergus Falls out of the city funds as a loan to him from the city. The bank had no interest in the mortgage, but simply held it in trust for the city, and afterwards, in 1896, executed and delivered to the city a declaration of trust to that effect. In 1898 the bank duly assigned the mortgage to the city, which assignment was duly recorded. After executing the mortgage, in 1891, Bell and wife deeded the property to one George Duryee, and finally the premises were conveyed to defendant in 1892.

On the question of notice of the mortgage by defendant when it purchased the property the court found as follows: "That said defendant, the Fergus Falls Hotel Company, at the time of the making and delivery of said last-described deed, and at all times thereafter, had actual notice and knowledge of the existence of said mortgage, and at all times prior to the beginning of this action, in all its dealings with plaintiff in reference thereto, said defendant recognized and admitted said mortgage as a valid and subsisting lien upon the prop-

[12] For discussion of principles, see Cooley, Mun. Corp. § 78.

erty described; that said mortgage was fully considered and taken into account by said defendant in its negotiations for the purchase of said premises and in arriving at the purchase price to be paid therefor."

The court further found that the property was sold for the 1893, 1894, and 1895 taxes, and that respondent was forced to pay $1,847 to protect the property from loss under tax judgments; that the taxes of 1897 were not paid, and the property was sold for the same in May, 1899. It is further found that on the 30th day of April, 1895, the principal was extended for the period of five years, at request of appellant. The interest was paid by appellant up to the 23d day of September, 1896.

As conclusions of law: That defendant was indebted to the plaintiff in the full amount of the principal, interest, and taxes paid, and that the property be sold to satisfy the same.

1. Section 31, c. 5, of the Special Laws of 1883 provides: "No money shall be paid out of the city treasury, except for principal or interest on bonds, unless such payments shall be authorized by a vote of the city council, and shall then be drawn out only upon orders signed by the mayor and countersigned by the city clerk, which orders shall specify the purpose for which they are drawn out, and the fund out of which they are payable and the name of the person in whose favor they may be drawn, and may be made payable to the order of such person." The order upon which the city treasurer paid out the money (Exhibit 5) is as follows: "Fergus Falls, Minn., Sept. 23, 1890. Please pay to C. D. Wright ten thousand dollars out of the permanent fund belonging to the city of Fergus Falls. E. Shaver, Acting Mayor. Wm. Hoefling, Clerk pro tem. To F. J. Evans, City Treasurer. $10,000." Defendant objected to the introduction of this order in evidence upon the ground that it was void on its face, not showing the purpose for which the order was drawn. The objection was overruled, and the order received. This ruling is assigned as error.

Counsel for the appellant take the position that the order was void for the reason assigned, that it would afford the city treasurer no protection if he paid out the city's money on such an order, and for that reason the city cannot predicate any rights upon it. Admitting that the officials of the city council issued a void order, and would be liable for so doing, and that the city treasurer paid out the money without authority, and that the order would not protect him, this only goes to show that the money was obtained from the city by an indirect and illegal manner, through the acts of its officers. The main issue to be determined in this case was whether the city had loaned the money, and could call into action the powers of the courts to enforce the collection of the debt. It is immaterial whether the money was obtained upon an order void upon its face or regular upon its face. Neither is it material whether the officers were acting in good

faith, as, no doubt, they were. The only purpose of introducing the order was to show that the money was paid out of the city treasury, and it was properly received.

2. Appellant claims that there was no evidence to justify the finding that the city ever loaned the money to Bell, conceding that he received the benefit of it. The argument is based upon two propositions: (1) That, the order being void, the city treasurer had no right to pay it, and charge the amount to the city. The act being void, no money of the city passed. (2) That the money coming to the treasurer was deposited in the banks in open account, subject to the treasurer's check; that the city had no money on deposit, but had parted with its title to the banks, upon the theory that the bank acquired title to the money deposited on open account. This may be technically true as a result of the method of bookkeeping; nevertheless, by means of the order, and a check drawn on the city funds in the bank, $10,000 of the city's money was drawn out, and paid over to the use of Bell. This was the ultimate fact found by the court, and the evidence is conclusive.

3. Again, it is urged that the city, having no power to make the loan, cannot evoke the powers of the courts in collecting it. The city certainly had no authority to loan this money. The act was not within its charter powers; but it does not follow that the city cannot recover it. It is true that the doctrine of ultra vires is, and ought to be, rigidly enforced in favor of a municipal corporation in order to protect its taxpayers from being plundered by the unlawful acts of its officers. But when, as in this case, a municipal corporation is seeking to have restored to its treasury money taken therefrom under color of an ultra vires contract, it does not lie in the mouth of the beneficiary of the wrongful act, or of his assignee with notice, to say that a lien securing the payment or return of the money is void because the money was obtained by virtue of a void contract; otherwise, the wrongdoer would be permitted to take advantage of his own wrong to the injury of innocent taxpayers. There can be no question about the city's power to collect from Bell if he were alive and solvent, under the decision in City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737, and there is no distinction in principle between that case and this. That decision rests upon the theory that the contract on the part of the city by which it paid $500 for the establishment of a shoe factory was void, being beyond its powers. The corporation, as such, had no power to make it, and its officers had no power to bind it. The money having been paid without authority, its payment was not a corporate act, and the corporation could recover the money.

The principle applied in that case is not changed by the effect of Cr. Code, §§ 136, 369, 370. Those sections apply to public officers, but can have no application to the city as such. The general rule that the law leaves the parties to an illegal transaction where it finds them

has no application. The officers of the city are not the city. The city cannot be bound by the unlawful acts of its officers in paying out its money. And, if the city may recover the money from those who received it, why may it not foreclose the mortgage, it being impossible to secure the money, or any part of it, in any other way? There is no difference in principle between the two remedies. The city is only recovering what it can of the funds illegally taken from its treasury. The defendant cannot complain. It bought the property with notice of the city's claim and lien. It is in no worse position than if the loan had been made by a private party. And it would be inequitable to permit it to benefit by the illegal act of the city officials under such circumstances. This right of a municipal corporation to enforce its claims under such circumstances has been recognized or applied in the following cases: Deering v. Peterson, 75 Minn. 118, 77 N. W. 568; Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; City of Buffalo v. Balcom, 134 N. Y. 532, 32 N. E. 7; Hay v. Railroad Co. (C. C.) 20 Fed. 15. Order affirmed.[13]

VII. Implied Promise [14]

VILLAGE OF PILLAGER v. HEWITT.

(Supreme Court of Minnesota, 1906. 98 Minn. 265, 107 N. W. 815.)

Action by the village of Pillager, Cass county, against S. M. Hewitt, as the Hewitt Bridge Company. Judgment for defendant. From an order denying a new trial, plaintiff appeals.

START, C. J.[15] Action to recover from the defendant the sum of $500 and village bonds to the amount of $1,300 paid and delivered by the plaintiff village to the defendant upon an alleged void contract for building a bridge for the village by the defendant. * * *

The principal question presented by the record for our consideration is whether the conclusion of law of the trial court was justified by the facts found, which, briefly stated, are these: The plaintiff is a village duly organized by virtue of Gen. Laws 1885, p. 148, c. 145. On October 9, 1903, the plaintiff and defendant entered into a written contract for the erection by the defendant of a combination bridge, according to plans and specifications agreed upon, over the Crow Wing river. The defendant built the bridge in all respects according to the plans and specifications and completed it April 1, 1904. Shortly thereafter the village council inspected the bridge and ac-

[13] The dissenting opinion of Brown, J., is omitted.

[14] For discussion of principles, see Cooley, Mun. Corp. § 80.

[15] Part of the opinion is omitted.

cepted the same. The plaintiff paid to the defendant during the month of March, 1904, the sum of $500 in money, and delivered to him its bonds in the sum of $1,300 pursuant to the contract for the building of the bridge, but has refused to pay the balance of the contract price for building the bridge on the ground that the contract is void. The contract was within the power of the plaintiff under the laws of this state, but was not entered into in the manner and form provided and required by the statutes, but it was entered into privately, and not upon and after advertisements for bids, as is required by law. He, however, fully complied with the contract and the same is an executed contract on his part and has been partially executed by the plaintiff by the payment of the money and the delivery of the bonds. The contract in question was entered into in good faith, and the price to be paid for the bridge thereunder was fair and reasonable; the profits made by the defendant under the contract were the usual profits on such structures, the bridge was necessary for the village, appropriate to the place, such as was required by the physical conditions, and the village was justified in contracting for and constructing it. It conclusively appears from the evidence that after the acceptance of the bridge it was carried away by a flood.

We have, then, a case where the plaintiff, a municipal corporation, was authorized by law to enter into a valid contract for the building of a bridge, and, in form, did so with the defendant, but by reason of its failure to comply with the details required by the statute (Gen. Laws 1885, p. 170, c. 145, § 51), in letting the contract, it was void. It may be conceded that the defendant could not have maintained an action on the contract to recover the contract price for the bridge, although he had fully performed the contract on his part; for upon the grounds of sound public policy the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations. This, however, is an action, in the nature of an action for money had and received, which is based upon equitable principles, to recover back the consideration paid by the plaintiff to the defendant for building a bridge which was accepted by it, and which fully complied with the terms of the contract. The fact that the bridge was afterwards carried away by a flood is not material, for it was not due to any fault of the defendant or any one else. After the acceptance of the bridge it became public property, which from its nature could not be restored to the defendant, and, of necessity, the plaintiff would retain and enjoy the benefits thereof so long as it stood. The defendant in good faith received the money and bonds in payment of the bridge which he had built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot main-

tain this action to recover them. Farmer v. City of St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199; Brown v. City of Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515.

The case of Borough of Henderson v. County of Sibley, 28 Minn. 515, 11 N. W. 91, cited by plaintiff's counsel, is not opposed to this conclusion, for in that case there was a total want of power on the part of the county under any circumstances to enter into the contract which was the sole consideration for the payment of the money which the borough sought by the action to recover back. In this case the plaintiff had the power to make the contract, but it was void, and only so by reason of an irregular exercise of the power by the plaintiff village, nevertheless the defendant fully performed the contract and the plaintiff voluntarily made the payment for which it received full consideration. But in the case cited, the county agreed with the borough in consideration of $5,000 paid by it to build a courthouse, give to the borough the right to use a portion of the building as a municipal hall, and if the county seat should at any future time be removed from the borough the county should have the option of transferring the courthouse and the land upon which it stood to the borough upon the payment of $3,000, or of refunding to the borough the $5,000 paid. The courthouse was built. There was, however, a total want of power on the part of the county commissioners to make the contract and the borough received no consideration whatever for the payment of the $5,000, except the supposed but unenforceable executory obligations of the county. The court held that the county having appropriated without rendering a consideration therefor and used the money of the borough, an obligation both moral and legal rested upon the county to make restitution. * * *

The assignments of error are not sufficient to raise any questions as to the admission of evidence. Order affirmed.

ELLIOTT, J., took no part, having heard the case in the district court.

IMPROVEMENTS

I. General and Local Improvements Distinguished [1]

PALMER v. CITY OF DANVILLE.

(Supreme Court of Illinois, 1894. 154 Ill. 156, 38 N. E. 1067.)

Petition by the city of Danville for the confirmation of a special tax levied by authority of the city council to pay the cost of providing and putting in sewer and water service pipes in Main street of that city. L. T. Palmer and others objected. There was judgment of confirmation, and the objectors appeal.

CARTER, J.[2] * * * It is urged in the objections, among other things, that the several water and sewer service pipes were intended for the use of the individual lot owners, and that the public could have no access to, use of, or interest in them whatever, and that, therefore, they did not constitute a "local improvement," within the meaning of the law. We do not regard this objection as well taken. All of the several water and sewer connections must be considered together, as one entire work, and, when taken in connection with the use of the mains which had already been provided, a local improvement especially useful and beneficial to the residents on the contiguous property and generally useful and beneficial to the city, was provided for. At least, the city council must have so regarded it in passing the ordinance, and we do not think there was any lack or abuse of power in the respect mentioned. Warren v. City of Chicago, 118 Ill. 329, 11 N. E. 218; Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 659, 25 N. E. 962; City of Chicago v. Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412, and cases cited.

It is also urged that, as the water mains mentioned in the ordinance belonged to a private company, the city had no control over them, except by virtue of the police power, and by virtue of rights reserved in granting the license to lay the mains in the street, and that such reserved rights did not include the right in the city to make water connections for private individuals, as a local improvement. It was stipulated in the court below, between the parties, that the water main is maintained, under the ordinances of the city, for the use of the city and its inhabitants; and the question is presented whether the mere fact that this main belongs to a private company, though located in a public street, and maintained for the use of

[1] For discussion of principles, see Cooley, Mun. Corp. § 86.

[2] Part of the opinion is omitted, the statement of facts is rewritten, and all of the concurring opinion of Bailey, J., is omitted.

the city and its inhabitants, under the provisions of an ordinance of the city, renders the ordinance and the proceedings under it in this case void. We do not think it does. The ordinance under which the water main was laid and is maintained was not given in evidence, and we must presume, in the absence of any evidence to the contrary, that the city has preserved and guarded its own rights and those of its inhabitants in its contract with the water company. These water pipe connections are a part of the entire improvement, and may be regarded as important in making the sewer and its connections more available and useful than they otherwise would be. In making this improvement so that it would be most useful and beneficial to the public and the property owners, the city had a large discretion, with the proper exercise of which the courts cannot interfere. Lightner v. City of Peoria, 150 Ill. 87, 37 N. E. 69.

It may be conceded that, to make the water-pipe connections available or beneficial, it was the duty of the city council to provide water mains to convey water to them,—in other words, to make provision for a supply of water; otherwise, the connections would be useless, and would not be an improvement at all, of benefit to any one. Hutt v. City of Chicago, 132 Ill. 352, 23 N. E. 1010. This duty the city has discharged, and doubtless in the manner that seemed best for itself, the property owners interested, and the inhabitants generally; and whether it should lay the main and furnish the water itself, or hire a private person or corporation to do so, is a question for the city council to decide, and not for the courts. It might be that if the contract with the water company were in the record, and the court could see that its terms and provisions were such as to make the ordinance providing for this improvement oppressive and unjust, in levying this tax to make connections with the water main which would never be of benefit to the contiguous property, this court would hold the ordinance invalid; but the record shows nothing more on this subject than that the water company owning the main maintains it, under ordinances giving it such right, for the use of the city and the inhabitants.[3] * * *

PAYNE v. VILLAGE OF SOUTH SPRINGFIELD.

(Supreme Court of Illinois, 1896. 161 Ill. 285, 44 N. E. 105.)

Proceeding by the village of South Springfield for the levy of a special tax for the construction of a sewer. From a judgment confirming the levy made, Edward W. Payne and others, property owners, appeal.

[3] The judgment of confirmation was reversed on other grounds. See Palmer v. City of Danville, post, p. 225.

Wilkin, J.[4] This is an appeal from a judgment of the county court of Sangamon county confirming the levy of a special tax by appellee to pay for constructing sewers in certain of its streets. * * *

The ordinance provides that the sewer shall be of vitrified sewer pipe, 30 inches in diameter, across the railroad right of way; and then a single-ring brick sewer, 30 inches inside diameter, along Locust and Sixth streets to the north line of Ash street; from thence north, to Myrtle street, vitrified sewer pipe 15 inches in diameter; and thence, to the northern extremity, 12-inch vitrified sewer pipe; from Ash street across Park block vitrified sewer pipe 20 inches in diameter, to the intersecting line of Seventh street extended; thence vitrified sewer pipe, 15 inches in diameter, to Myrtle street on Seventh and Eighth streets; and from Myrtle street north, pipe 12 inches in diameter,—the whole sewer to have necessary manholes and inlets. Section 4 provides that the cost, through the right of way of the railroad, of street crossings, and of work in and across Park block, shall be paid for by general taxation. Section 5 provides that the remainder of the cost shall be paid by special taxation of lots and land fronting or abutting on the streets along which said sewer is laid, in proportion to their frontage. Section 6 provides for appointing a committee to make estimates, and section 8 for letting the contract.

The committee appointed to make the estimate of the cost of the work made a report to the village board, which was set aside, and the matter referred back to the same committee to make a corrected estimate. It again reported, estimating the cost of the various sizes of pipe and brick work prescribed in the ordinance, per foot, and the whole number of each kind which would be required to complete the work, which, with the cost of 24 inlets and one manhole, aggregated $4,237.80, as the "total cost of sewer complete." To this they added the cost of levying, assessing, and collecting, $343.67, making the total estimated cost $4,581.47, which they divided: "Total by general taxation, $1,488.40; total amount by special taxation, $3,093.07." This estimate was duly approved by the village board, and the village attorney ordered to file a petition in the county court for the levying of the special tax. The prayer of that petition was granted, and commissioners were duly appointed to make the assessment. To the assessment roll returned by these commissioners appellants filed numerous objections, which upon the hearing were each overruled, and the assessment confirmed, and objectors perfected this appeal. * * *

It is again insisted that the ordinance is invalid because of the objection that it provides for more than one improvement. The most that can be said is that it authorizes the construction of a main sewer with branches. There is certainly less reason for saying this

[4] Part of the opinion is omitted.

is authorizing several improvements than where an ordinance provides for paving two or more streets as one improvement; and ordinances of this latter kind were sustained by this court in City of Springfield v. Green, 120 Ill. 269, 11 N. E. 261; County of Adams v. City of Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, and many other cases therein referred to. * * *

The objection to the validity of the ordinance most strongly insisted upon is that it is unreasonable and oppressive. It cannot be denied that the sewer provided for in the ordinance is a local improvement, within the meaning of section 1, art. 9, c. 24, Rev. St. It is admitted that this court has frequently sustained special assessments for the construction of sewers, and clearly that could only have been done on the ground that they were local improvements. Being such, authority to make them by special taxation, as well as by special assessment, is expressly given by section 1, supra. In City of Galesburg v. Searles, 114 Ill. 217, 29 N. E. 686, it was expressly held that an ordinance providing for the construction of a sewer, to be paid for one-half by general tax and one-half by special tax, to be levied on contiguous property, was valid. It is true that ordinance provided that the special tax should be levied in proportion to the benefits accruing to the contiguous property, but it was said: "Having determined to raise only one-half the cost of the improvement by special taxation of contiguous property, it was open to the city council to adopt which one of the various modes of special taxation of the property they saw fit,—whether according to frontage of the property, value, benefits received, or otherwise."

That grading or paving a street, and the laying of sidewalks are local improvements, to pay for which a special tax may be levied upon contiguous property, in proportion to frontage, has been the law of this state since the decision in White v. People, 94 Ill. 604. That the benefits accruing to property contiguous to a street in which a sewer, like the one contemplated by this ordinance, is laid, differ in kind, and perhaps in degree, from those derived from improving the street itself, or laying sidewalks, is admitted; but the benefits are certainly no less local to the adjacent property in the one case than in the other. But it is said a special tax levied on the lots of land lying on the street in which the sewer is laid, in proportion to frontage, in this case, operates unjustly, and is therefore unreasonable. We said, in White v. People, supra: "Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of property benefits. That is generally considered as a very reasonable measure of benefits in the case of such improvements, and though it does not in fact, in the present case, represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply." This doctrine has been assailed time and again, but

never departed from by this court. It was said, in City of Springfield v. Green, 120 Ill. 269, 11 N. E. 261, after citing numerous decisions: "If it be possible to settle any question by repeated decisions, all the same way, the present surely ought to be regarded as finally and irrevocably settled." And in the late case of Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077, it was reannounced, with a citation of numerous later decisions to the same effect.

Counsel seem to understand that the cases of City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366, and City of Bloomington v. Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487, are to the contrary. This is a misconception of those cases. In each of them the ordinance before the court showed upon its face that the property sought to be taxed was not only not benefited by the improvement, but actually damaged thereby. There the question was not whether the tax exceeded the benefits, but whether a special tax could be legally levied at all; it appearing that no benefits whatever could possibly accrue to it. Here it is not pretended that the property of objectors will not be benefited by the sewer, nor is it claimed that the improvement is not one proper to be made. The sole objection is that, by adopting the system of levying the special tax by frontage instead of according to benefits to be estimated by commissioners, injustice to property holders has been done, and, as we have seen, that question was not open to consideration in the county court, nor is it subject to review here. We do not think the position that the ordinance is invalid, because it does not provide for the levying of a special tax upon the railroad right of way is tenable. The railroad right of way is not, in any proper sense, contiguous to the sewer, which simply passes through it underground.[5] * * *

II. Power to Make or Aid [6]

CITY OF RALEIGH v. PEACE.

(Supreme Court of North Carolina, 1892. 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.)

See post, p. 218, for a report of the case.

[5] The judgment of confirmation was reversed on other grounds.

[6] For discussion of principles, see Cooley, Mun. Corp. § 87.

III. Preliminary Proceedings [7]

BUCKLEY v. CITY OF TACOMA.

(Supreme Court of Washington, 1894. 9 Wash. 253, 37 Pac. 441.)

Action by J. M. Buckley and by Robert Wingate and others against the city of Tacoma and others to set aside assessments for local improvements. From judgments for defendants, plaintiffs appeal.

STILES, J.[8] The enabling act for cities of the first class (Gen. St. § 520) provides that any such city framing a charter for its own government shall have power (subdivision 10) "to provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof"; (subdivision 13) "to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor." Section 52 of the charter of Tacoma begins thus: "The city government of Tacoma shall have powers, by ordinance and not otherwise," repeating the language of the statute, with the exception of the last clause of subdivision 13, for which there is substituted: "Provided the manner of making and collecting assessments therefor shall be as prescribed in this charter." But when the reader of the charter gets to article 12, which is a complete code of street improvement and assessment law, he finds that not an ordinance, but a resolution, is required.

Appellants make a strong point of this, and insist that anything less than an ordinance renders the whole proceedings leading up to a street assessment void. But the learned judge who heard the case below held that the specific provisions of the article mentioned must govern the general ones of section 52, and we quite agree with his conclusion. Although the enabling act conferred the power, it did not undertake to say how it should be exercised. Very often such powers are made effective through general ordinances, but here the charter framers, and thereby the city en masse, have seen fit to prescribe even a more solemn and formal law on the subject by providing for a charter system which is rigidly binding upon both the legislative and executive powers of the corporation. We do not see how any substantial injury can be done, either, through this construction, and it remains merely to examine the record, to see how the mandates of the charter have been carried out.

[7] For discussion of principles, see Cooley, Mun. Corp. § 88.

[8] Part of the opinion is omitted.

The charter provides for the establishment of a board of public works, with a clerk, and specifically delegates to it many executive duties, and the appointment of sundry officers, among whom is a city engineer, who is required to make all necessary surveys of public work under the direction of the board. Article 12, so far as is necessary for the consideration of this case, reads as follows:

"Sec. 135. All applications for establishing or changing the grade of any street or streets, the improvement of public grounds or buildings, the laying out, establishing, vacating, closing, straightening, widening or improvement of any street, road or highway, or the laying out or opening of any new street through public or private property, and for all public improvements which involve the necessity of taking private property for public use, or where any part of the cost or expense thereof is to be assessed upon private property, shall be made to said board, and such work or improvement, shall not be ordered or authorized until after said board shall have reported to the city council upon said application. But before any work or improvements as above contemplated shall be commenced, the city council, when recommended by the board of public works shall pass a resolution ordering that said work be done; provided that all applications for the purpose of changing the grade, or of making any improvements upon any street, avenue or alley, within the city shall be signed by at least three resident freeholders, owners of property abutting upon said street, avenue or alley; provided, however, that the city council may without petition or recommendation have power to order the improvement of any street, avenue or alley, or any part thereof by a two-third vote of all members of the city council.

"Sec. 136. Upon the adoption or passage of any resolution by the city council for the improvement of any street, avenue or alley, the board of public works shall cause a survey, diagram and estimate of the entire cost thereof, to be made by the city engineer; said diagram and estimate shall be filed in the office of the board of public works for the inspection of all parties interested therein. The clerk of said board shall forthwith cause a notice of such filing to be published daily for ten days in the official newspaper; such notice shall contain a copy of the said resolution passed by the city council, and must specify the street, highway, avenue or alley, or part thereof, proposed to be improved, and the kind of improvement proposed to be made, together with the estimated cost and expense thereof, and also a general description sufficient for identification of the property to be charged with the expenses of making such improvements. * * *"

Without petition, the council passed this resolution, by unanimous vote: "Resolved by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street, in Buckley's addition, from Steele street to Pine street, at the expense of the abutting owners. Grading and sidewalking. To be done by day labor." The board of public works, in due course, published a notice

as follows: "Notice is hereby given that the following is a true copy of a resolution of intention passed by the city council February 27, 1892, to wit: 'Resolved, by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street, in Buckley's addition, from Steele street to Pine street, at the expense of the owners of the lots and parcels of land affected by said improvement, according to the city charter; said improvement to consist of grading to an established grade, and building sidewalks on both sides thereof. And the city engineer is hereby ordered to make a survey, diagram, and estimate of the said improvement, and file the same in the office of the board of public works.' That the survey, diagram, and estimate of the cost of said improvement were filed in the office of the board of public works March 7, 1892, by the city engineer, and the estimated cost thereof is $1,850."

The filing of a diagram and estimate consisted in the engineer's writing in an estimate book kept in the office of the board the following:

N Street in Buckley's Addition.

Steele to Prospect	cut	78	fill	1,055	curb	810
Prospect to White	"	539	"	157	"	270
White to Oak	"	1,453				
Oak to Race	"	575	"	46	"	29
Race to B'd'y	"	92	"	317	"	290
Totals		2,737.		1,575		1,309

2,136 lineal feet of 7 walk.
80 " " " " aprons.
344 " " 6 " Xings.
2,136 " " gutters.
424 " " drain box.

1,800 feet frontage.
Estimate March 7, 1892, $1,850.

No remonstrance of the owners of half or more of the lots to be assessed for the improvement was filed, and the board, without further order from the council, proceeded to make the improvement, completing it June 4, 1892, at a cost of $1,885.94. * * *

Four things plainly appear from the record thus set out, viz.: (1) No resolution was passed ordering any improvement made on N street. (2) The engineer did not file a diagram in the office of the board. (3) Neither the board nor its clerk published a notice containing a copy of the resolution that was passed. (4) The notice contained no description of the property to be charged. But the respondents' position is that this does not matter, as something was done which was, in each particular, intended to comply with the mandatory provisions of the charter. The question is, when did the city obtain jurisdiction to make this improvement and charge abutting property with the expense? Obviously, so far as these cases go, it was when such proceedings had been taken by the city as that the

owners of the property to be charged had had the notice prescribed by the charter, and were bound to remonstrate or be estopped. To bring matters to such a point in a case where the proceeding is without petition, the council must have ordered the improvement, the engineer must have filed a diagram and estimate, and the clerk of the board must have published the notice.

1. The Resolution. The initiative step is the resolution which orders the improvement to be made. No such order can be intelligible which does not reasonably describe the kind of improvement intended, not, as counsel for respondents suggests would follow, with such particularity as would be necessary in the making of a contract for the work, but with such fullness of description as would enable an engineer who had no previous familiarity with the matter to make his diagram and estimate after survey of the street. Allowing that the verbless phrase used in the resolution before us means that it is the intention of the council to improve the street by grading it and constructing sidewalking, the query at once suggests itself, what is to be the extent of the grade, and what kind of sidewalk is proposed? There may or may not have been an established grade on N street, and, if there were such a grade, it may or may not have been the intention to conform to it in making this improvement. There is an infinite variety of sidewalks,—wood, iron, stone, brick, concrete, —of more forms than there are materials, some cheap and some expensive, but all sidewalks. How could the engineer make an estimate of the cost, or the board construct the work, without substantial directions in these particulars? The answer comes promptly with the suggestion: Either they could not proceed at all, or they must proceed according to their own ideas. In this instance they took the latter course, but without any authority, since it lies with the council alone to prescribe the method of making all such improvements.

Something is suggested in argument as to there being general ordinances of the city governing the improvement of streets, which served as a guide to the engineer and board of public works. There is nothing of this in the record, and, if there were such ordinances, they should have been referred to in the resolution in such a way as that parties interested would know where to look for a description of the kind of improvement intended. Streets are not, and usually cannot be, made after one pattern, like the interchangeable parts of a machine. One way of making an improvement may be substantially as good as another, and may serve the purpose just as well, although the difference in cost may mean an easy payment by the owner in one case and substantial ruin in another. It is not to be supposed that the council would overlook such considerations, but that it would endeavor, while prosecuting a reasonable improvement, to lighten the burden of expense as much as possible in each particular case, without regard to any fixed, inflexible rule of procedure. To accomplish this it must know the circumstances surrounding the

proposed work, and with this knowledge it can easily prescribe the general features of the improvement. To do otherwise is to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive them of the opportunity to remonstrate in sufficient numbers if they see fit. But the worst of such a loose system is that it leaves to mere executive officers the exercise of a large discretion which the charter does not confer upon them. In other cases, which are also before us, the evil of such a system appears clearly exemplified. But perhaps the greatest defect of this resolution is that, while it declares the intention of the council to improve N street, it does not order anything, and furnishes no basis for any action on the part of the engineer and board of public works.

Counsel for the respondents endeavor to excuse the method of procedure by resolution of intention by saying that the council had merely followed a habit acquired under the charter of 1886 (section 144). But under that charter the council itself controlled the work. The determination of the character of the work was equally necessary, and no such work could be done at all at the expense of the property except upon petition of the resident owners of more than one-half of it. But, be that as it may, the present charter had been in operation a year and a half when these proceedings commenced, and the "habit," under the old charter, cannot be accepted as an amendment to the new one. The resolution of intention should have defined the improvement intended, and directed the board of public works to proceed with its execution as defined, after notice, and upon the failure of property owners to present a sufficient remonstrance.

2. The Diagram and Estimate. The charter prescribes that a diagram and estimate shall be filed after a survey by the engineer. So far as the property owner is concerned with the estimate, the gross estimate of the cost and the total amount of frontage would seem to be about all he is interested in, since the charter method of payment is according to the front foot, and he can be charged for nothing in excess of the estimate. These two items, therefore, would enable him to calculate his probable expense. But the diagram, if it serves any purpose at all to the owner, must be intended to show him how the improvement, when completed, will probably affect his property, so that he can intelligently determine whether he will remonstrate or not. It may be of the very highest importance to him to know whether he is to be left on the brink of a cliff or at the foot of a trestle; whether the assessment he will be called upon to pay will be his total expense, or whether this will be but the beginning of a large outlay necessary to protect his front or restore it to a safe, convenient, and decent condition. Perhaps, in the case of a new and uninhabited street, these would not be very important matters practically, but it is to be remembered that this charter prescribes a universal rule for all cases of street changes and improvements, and that the precedent laid down as a rule for a lot-booming street out in the woods make

the same rule that will be applied should the grade of the most important street in the city be raised or lowered. There was no attempt to comply with the charter in the matter of a diagram in this instance, and therefore one of the purposes of giving a notice was rendered futile.

3. The Notice. By the notice published the owners of property abutting upon N street from Steele to Pine were given to suppose that the council had passed a resolution which was never before that body. The framer of the notice appears to have been apprehensive that the resolution as passed was defective in some particulars and therefore he changed it and added to it matter enough to more than double its actual length. The publication of a copy of the resolution in the notice is intended to bring home to the property owner information that the council has acted in a matter of interest to him and to let him know precisely what it has done and proposes to do. This copy to be published means a literal copy according to the usual way in which the word is used and not the construction which the clerk of the board of public works may put upon the meaning of the resolution. However, in justice to the clerk in this instance, it ought, perhaps, to be said that he had nothing whatever to do with the publication, which was made by the individual members of the board, thus adding one more item to the list of charter infractions. The notice is by the charter required to specify the kind of improvement proposed to be made, and to contain a general description sufficient for identification of the property to be charged. The first of these requirements would be met by the copy of the resolution if that document contained any sufficient specification; the second gives rise to further consideration. The resolution in this case declares the intention to be to improve "at the expense of the abutting owners." The notice improves upon the original by the phrase, "at the expense of the owners of the lots and parcels of land affected by said improvement, according to the city charter." Neither is a correct statement, critically considered, for the expense is not charged upon the owners, but is assessed to land without regard to ownership, but this is a matter of small consequence.

The respondents' reply is that section 138 of the charter makes it obligatory upon the city to levy the assessment in a certain way, each lineal foot of frontage along the line of the improvement paying its proportion of the total cost; so that every person owning property along a street, knowing the law, must know that, when that street is to be improved, his property will necessarily be included in the assessment. The argument is well enough as far as it goes. But what is it worth in the face of the charter direction? According to this theory, when the charter required the notice to specify the street, or part thereof, proposed to be improved, it should have stopped, because the owner could well enough reason out the necessary conclusion as to the liability of his property. It went on, however, and

specifically required the property to be charged to be described in a way sufficient for identification; and, more than this, the very first clause of section 138 is in these words: "Such cost and expenses of making said improvement shall be assessed upon the adjoining, contiguous or proximate lots or parcels of land described in said notice, in the following manner;" thus emphasizing what seems to us to have been the clear intention, viz. that each owner should have laid under his eyes specific information that his property was to be assessed, without any resort on his part to argument or conclusion.

And this case furnishes an excellent illustration of the value of such a requirement, for where lots lie endwise to a street they are to be assessed their full share of the cost according to frontage, but where they lie lengthwise half of the cost is to be assessed to the first lot, and the other half to other lots in the rear to the center of the block. Now, it happens that N street runs through blocks in all of which the lots lie lengthwise along it, and there are sixteen lots in each tier, so that one lot must pay half the expense assessed on a hundred feet frontage, and seven lots pay the other half. Could the holder of a deed to lot 27 in block 7, which is the sixth lot from the street, without a familiarity with the lot and block system of Buckley's addition, which is not to be presumed, know whether his lot would be within the assessment district, unless he hunted up a plat? Had he not, under the express language of the charter, a right to expect to see, in a notice of the improvement of N street, his lot specifically named, or at least "lots 25 to 32, inclusive, in block 7," which would have been a sufficient description in this instance, even for a deed? If he did not, then of what use is the minute particularity of this charter in the matter of street improvements?

If the city's officials can override these plain, mandatory provisions in the many particulars already pointed out, and improve streets ad libitum, and the property owner be bound on theories of substantial compliance, estoppel, waiver, benefits, or failure to tender fair value, we fail to see any sensible reason for such provisions in a charter. But the people who pay for streets made the charter, and, while they granted to the public authorities most liberal powers, by permitting the arbitrary improvement of streets at local expense, they emphatically reserved to themselves the right to have three things distinctly brought to their knowledge, viz.: (1) What improvement it is proposed to make; (2) what the cost is to be; (3) what property is to be charged with the expense. This knowledge they declared must be afforded in a certain way, and after that they reserved the right to remonstrate, and to have a two-thirds vote of the council to overcome their objections. It is unnecessary to cite authorities on these points. The A, B, C of the laws of municipal corporations, that the power to levy special assessments is to be construed strictly, that the mode prescribed is the measure of power, and that material requirements must be complied with before there is any liability, is all that

need be quoted. Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077. An assessment made contrary to these principles is void, and injunction lies to restrain its collection. Dill. Mun. Corp. §§ 803, 804; Hill, Inj. § 539. * * * Reversed.

GRAY v. BURR.

(Supreme Court of California, 1902. 138 Cal. 109, 70 Pac. 1068.)

HARRISON, J. Action upon a street assessment in the city and county of San Francisco. Judgment was rendered in favor of the defendants, and from this judgment, and an order denying a new trial, the plaintiffs have appealed.

The work for which the assessment was made is "laying granite curbs and artificial stone sidewalks on Union street between Franklin and Gough streets, where not already laid, and except where bituminous rock sidewalks are laid." The resolution ordering the same was passed September 28, 1896, and the assessment sued upon was issued February 18, 1897. The complaint does not set forth the resolution of intention for doing the above work, or the date of its passage; but at the trial the defendants, under certain averments in their answer, introduced in evidence a resolution passed by the board of supervisors July 20, 1896, declaring its intention to order "that granite curbs be laid on Union street, between Franklin and Gough streets, where not already laid, and that the roadway thereof be paved with bituminous rock, except that portion required by law to be kept in order by the railroad company having tracks thereon." It was also shown that on August 10th the owners of a majority of the frontage upon that block filed a protest against the above work, upon which was indorsed, under date of September 23, 1896: "Majority protest, which under the law stops further proceedings for six months." The above resolution of intention does not include the work of "artificial stone sidewalks," and the paving of the roadway, which is included therein, is not covered by the assessment herein; and, as above stated, the time at which a resolution of intention for laying the artificial sidewalks was passed by the board does not appear in the record.

It is contended by the appellants that under the statute a protest against the improvements by the owners of a majority of the frontage does not have the effect to oust the board of jurisdiction to order the work unless the improvement is "for one block or more," and as the above resolution of intention calls for laying curbs "where not already laid," and, as it appears from the assessment that curbs had been laid on a large portion of the block, the improvement herein was for less than one block, and the above protest did not, therefore, have the effect to deprive the board of jurisdiction to order the work. The statute, however, in a subsequent portion of the section, declares: "When the work or improvement proposed to be done is the construction of

sewers, manholes, culverts or cesspools, cross-walks, or sidewalks and curbs, and the objection thereto is signed by the owners of a majority of the frontage liable to be assessed for the expense of said work as aforesaid, the said city council shall at its next meeting fix a time for hearing said objections, not less than one week thereafter. The city clerk shall thereupon notify the persons making such objections, by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector, or his agent, when he appears for such objector. At the time specified said city council shall hear the objections urged and pass upon the same, and its decision shall be final and conclusive, and said bar for six months to any further proceedings shall not be applicable thereto."

Under this provision the council is not authorized to order such improvement when objections thereto are filed by the owners of a majority of the frontage "liable to be assessed for the expense of said work" until after it has heard and passed upon the objections at a time fixed by it, upon notice therefor given as directed by the statute. The jurisdiction of the board was not affected by the erroneous construction which it gave to the statute in reference to the objections; but, while the filing of the objections did not have the effect of an absolute veto upon its jurisdiction to order the work, it suspended the exercise of that jurisdiction until the objections of the protestants had been passed upon, and as the resolution ordering the work was passed without giving to the owners any opportunity to be heard, and at a time when the board was without authority to pass it, the subsequent proceedings were unauthorized, and the assessment created no lien. The right to protest against laying granite curbs was not impaired by the fact that the above resolution of intention did not also include the sidewalks. The board could not, by providing for the work of sidewalks and curbs in separate resolutions of intention, deprive the owners of the right of protest against either of the items. Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535. And as the assessment sued upon includes the cost of the curbs with that of the sidewalks, no lien is created thereby, even if it be shown that the proceedings for laying the artificial stone sidewalks were without objection. Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339.

The judgment and order are affirmed.

IV. Special Assessments [9]

STATE (RAYMOND'S ESTATE et al., Prosecutors) v. BOROUGH OF RUTHERFORD.

(Supreme Court of New Jersey, 1893. 55 N. J. Law, 441, 27 Atl. 172.)

Certiorari by the state, at the prosecution of the estate of Aaron Raymond and others, against the mayor and common council of the borough of Rutherford, to review the final assessment of grading Union avenue from Erie avenue to the Passaic river, in the borough of Rutherford. Assessment sustained.

LIPPINCOTT, J.[10] This certiorari brings up for review the final assessment for grading Union avenue from Erie avenue to the Passaic river, in the borough of Rutherford. The whole length of the improvements was 13,409.96 feet. There are two plots assessed to the prosecutors. The plot on the northwesterly side of the avenue has a frontage thereon of 2,065.06 feet, and is designated as "Plot No. 47" on the assessment map, and is assessed for the sum of $1,497.16. The plot on the southeasterly side of the avenue has a frontage thereon of 2,062.50 feet, and is designated as "Plot No. 81" on the assessment map, and is assessed for the sum of $1,495.31. The total cost and expense of the improvement amounted to the sum of $9,706.43. The whole of the amount, with the exception of $183.44, was assessed, as benefits received, upon the owners of lands claimed to have been benefited. This sum of $183.44 was by the commissioners of assessments adjudged to be an excess of benefits, and was placed upon the borough at large. The reasons for setting aside the assessment will be taken up in the order in which they were discussed in the argument. * * *

The seventh objection is that the commissioners admitted that they favored making every street pay for its own improvements,—that is, pay for itself, without regard to benefits,—and that, therefore, they are not disinterested commissioners. It appears from the evidence of Mr. Ely, a witness in the case, that after the making and filing of the report of assessments, and upon the hearing of objections, at the time appointed for such hearing, in the discussion which ensued, the chairman of the commissioners said to him that it was the policy of the borough to assess the cost of the improvement of the streets upon the streets so improved, and they calculated to make each street pay for its own improvement, and that at this time there was no dissent expressed by the other commissioners. It does not appear that their attention was again called to the matter, in connection with this street improve-

[9] For discussion of principles, see Cooley, Mun. Corp. § 91.

[10] Part of the opinion is omitted.

ment, or that it was anything more than a casual remark, and it is not such an expression as would warrant a legal conclusion that the commissioners were not disinterested. It might well be found, upon examination of all the circumstances, that the policy of making each street in the borough of Rutherford pay for its own improvement might not be discordant to the application, practically, of the principle that for such improvements lands should be assessed only in proportion to benefits received. * * *

The fifth reason urged for nullifying this assessment against the prosecutors is that the whole assessment, including that made upon the lands of the prosecutors, is made upon the frontage of lands fronting on said avenue, without regard to the size, value, or depth of the lots assessed. This contention is not sustained by the evidence. The report of the commissioners is "that we, and each of us, have personally and thoroughly examined the said Union avenue and adjacent property, and lands specially benefited by said grading; that we have justly, fairly, and equitably assessed the aforesaid cost and expense upon the lands and real estate specially benefited by such improvement to the extent and not beyond such benefit; and that in making such assessment we have, in each and every case, had due regard and consideration to the benefits received by such lot and parcel of land from such improvement, over and above all damages sustained by each of said lots or parcels of land, and that in no case have we assessed any lot or parcel of land more than the amount of such benefit." This is the standard of assessment provided for by the borough laws governing this subject-matter. Laws 1887, p. 126, § 4.

I find no evidence assailing the area of the assessment, whatever may be said of the benefits accruing within it. The judgment of the commissioners was that the special benefits in this case were clearly limited to the frontage. It will be found that the rate of the various assessments is not always the same. In most instances it will be found that the conditions were merely identical, and there was but little reason for any difference. But the judgment of the commissioners is that the benefits laid by them were special benefits, laid according to benefits bestowed, and not in excess thereof. There is no evidence that in laying the benefits, so far as there were benefits, upon the frontage, the commissioners did not conform to the principle of peculiar benefits. The principle of frontage assessment is not necessarily wrong. If that mode properly distributes the benefits among the owners of property benefited, there can be no objection to its use. Jersey City v. Howeth, 30 N. J. Law, 529; Pudney v. Village of Passaic, 37 N. J. Law, 65. The commissioners assessed all the lands which, in their judgment, were benefited. This judgment has not been successfully assailed by the evidence or facts of the case. Hunt v. Mayor, etc., of Rahway, 39 N. J. Law, 646.

The last reason to be discussed—the first among the reasons of the prosecutors—as an objection to this assessment is that "the said assessment upon the lands of the prosecutors for the said improvement is largely in excess of all benefits the said lands will derive from said improvement," and this includes a consideration of the contention of the prosecutors that a very large portion of this cost and expense should have been borne by the borough at large. * * * The report of the commissioners is before us, and the rule of law is clear that upon these points their judgment cannot be interfered with, unless the force of the circumstances and evidence convinces us that it is wrong, and that an injustice has been done. The rule is well established that the assessments for benefits for street improvements, where the commissioners have been over the ground, and examined the premises, and made their report of estimates according to the principles prescribed in the charter, will not be set aside upon conflicting evidence of the justice or sufficiency of said assessment. It must clearly appear that injustice has been done before an assessment will be set aside upon all the facts. This is the rule, notwithstanding the statute which authorizes the court to determine disputed questions of fact as well as law. Jelliff v. Newark, 48 N. J. Law, 101, 2 Atl. 627; Hegeman v. City of Passaic, 51 N. J. Law, 113, 16 Atl. 62. * * *[11]

CITY OF RALEIGH v. PEACE.

(Supreme Court of North Carolina, 1892. 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.)

Action by the city of Raleigh against J. A. Peace to recover a special assessment. Judgment for plaintiff. Defendant appeals.

SHEPHERD, J.[12] While we are of the opinion, for the reasons hereinafter stated, that the particular judgment rendered in this action cannot be sustained, yet, as the validity of the ordinance under which the assessment is made is drawn in question, and as it is of great importance that it should be passed upon by this court, we deem it our duty to consider this and such other points that are presented in the record as may be necessary to an intelligent disposition of the present and perhaps other cases which may arise upon the subject.

1. The authority of the legislature, either directly or through its local instrumentalities, to exercise the taxing power in the form of local or special assessments, has been so firmly established by judi-

[11] See, also, Payne v. Village of South Springfield, ante, p. 203.

[12] Part of this opinion and all of the dissenting opinion of Merrimon, J., are omitted.

cial decision in this and other states of the Union that it can hardly, at this late day, be considered an open question; but, as it seems to be controverted by the argument of counsel, it may not be improper to state in a general way the principle upon which it is founded, as well as to refer to some of the multitude of authorities in its support.

Judge Cooley, in his work on Taxation (page 606), says that special assessments "are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated, as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it."

"The rationale of the system," says Mr. Burroughs, "is that the purpose is a public one which justifies the levy of a tax, but the benefit of the improvement is not only local, but also specific, benefiting particularized property; and therefore the tax may be levied on this property which receives a benefit over and above other property in the state. * * * An assessment for improvements is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement." Burroughs, Tax'n, 460.

Judge Dillon (2 Dill. Mun. Corp. § 752n) quotes with entire approval the language of Slidell, C. J., in Municipality No. 2 v. Dunn, 10 La. Ann. 57. The chief justice says: "I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable, and will result in great extravagance, abuse, and injustice. I think the system of making particular localities, which are specially benefited, bear a special portion of the burden, is safer, and more just to the citizens at large, by whose united contributions the city treasury is supplied. What is taken out of the treasury is out of the pockets of all the proprietors."

Speaking of special assessments, the supreme court of Missouri, in Lockwood v. St. Louis, 24 Mo. 20, said that "their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. * * * General taxation for a mere local purpose is unjust. It burdens those who are not benefited, and benefits those who are exempt from the burden."

These assessments are not to be confounded with the exercise of the right of eminent domain, (Cooley, Const. Lim. *498; 2 Dill. Mun. Corp. § 738; Lewis, Em. Dom. § 4;) and it is also to be observed that while they are taxes in a general sense, in that the au-

thority to levy them must be derived from the legislature, they are nevertheless not to be considered as taxes falling within the restraints imposed by article 5, § 3, of the constitution, although the principle of uniformity governs both. Shuford v. Commissioners, 86 N. C. 552; Cain v. Commissioners, 86 N. C. 8; Busbee v. Commissioners, 93 N. C. 143; Cooley, Const. Lim. *498; 2 Dill. Mun. Corp. § 755 et seq.

The principle deducible from the foregoing quotations finds a striking illustration in the facts of the present case. The district improved by the pavement embraces only a part of one street; and, while the improvement may add very greatly to the convenience and comfort of all of the citizens, it at the same time confers upon the abutting real property an enhanced pecuniary value, out of all proportion to the benefits inuring to the public at large. Would it be just that all should be taxed alike, and that the owner of property in a remote part of the city be compelled to contribute as much towards the particular improvement as those whose lands are thus peculiarly benefited? This would savor very much of the "forced contributions" of the olden time, which are so generally denounced as obnoxious to the principles of free government; and the bare statement of the proposition shocks all sense of justice, and furnishes its own refutation. It is, therefore, but pre-eminently just, as well as the duty of the lawmaking power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred; and it is for the very purpose, as we have seen, of accomplishing this end, and of preventing so great a perversion of the taxing power, that these local or special assessments are almost universally resorted to. It is true that the power to levy such assessments is sometimes abused, and that some of the methods adopted have been judicially condemned, but the existence of the power itself is as well established as it is possible by judicial decision to establish any legal principle whatever. Wilmington v. Yopp, 71 N. C. 76; Cain v. Commissioners, supra; Busbee v. Commissioners, supra; 2 Dill. Mun. Corp. § 761; Cooley, Const. Lim. 506; 1 Hare, Amer. Const. Law, 301; Elliott, Roads & S. 370.

2. We will now consider whether the power of the legislature was properly exercised in the case before us. It is a general rule, everywhere conceded, that the discretion of the legislature in levying taxes, when exercised within constitutional limits, is conclusive; but in respect to special assessments the principle is questioned, and it is urged that these not being strictly taxes, and not subject as such to the restraints imposed by the constitution, but being founded solely, as some authors say, upon the principle of betterments of the property to the extent of the improvement, the courts should not surrender the power to review an arbitrary decision of the legislature, either as to the necessity for, or the benefi-

cial character of, a particular improvement, or the manner in which the benefits are to be ascertained and assessed. That the judicial power has been successfully invoked in some instances will appear from the cases of Seely v. Pittsburgh, 82 Pa. 360, 22 Am. Rep. 700; Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255; and other decisions cited in the notes to section 753 of volume 2 of Dillon on Municipal Corporations. Ruffin, J., in Shuford v. Commissioners, supra, says that such assessments "are committed to the unrestrained discretion of the law-making power of the state, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantages it may derive therefrom."

The latter part of the sentence very clearly implies the power of the courts to interfere to some extent, and in this we very heartily concur; but it is not essential, in this case, that we should define and mark the limits of this power, and it is sufficient to say that, according to all of the authorities, the legislature or its duly-authorized instrumentalities are at least primarily the judges in respect to the particulars mentioned, and that their decision will not be disturbed unless it clearly appears that there is an absence of power, or that the particular method prescribed for the assessment of the peculiar benefits to the abutting property is so plainly inequitable as to offend some constitutional principle. The power to make such assessments must be clearly authorized by the legislature, but it is not necessary, and, "of course not to be expected. Indeed, it is scarcely conceivable that the legislature should, in conferring authority upon local bodies, specify in minute detail the incidents of the power. The courts generally hold that necessary incidental and subordinate powers pass with the grant of the principal power. Any other ruling would make it practically impossible to frame statutes capable of reasonable enforcement. In matters of street improvements and local assessments, as in kindred matters, it is generally held that a power clearly conferred in general words will carry all the incidental authority essential to the execution of the power in ordinary and appropriate methods." Elliott, Roads & S. 374.

It is urged that all of these subordinate incidents should be provided for in the act granting the power, because of section 4, art. 8, of the constitution, which requires the legislature to provide for the organization, etc., of incorporated towns, etc., "and to restrict their power of taxation, assessment, borrowing money," etc. Similar provisions have, upon the best authority, been held inapplicable to assessments of this character. They are construed, says Judge Dillon, (Mun. Corp. § 778,) "not to apply to special assessments by municipal corporations made by authority of the legislature for local improvements." The restrictions in such cases are to be found in those general principles of the constitution which protect the

liberty and property of every citizen. Even if such a provision did apply, it is not easy to understand how the duty to restrict the power requires that all of the incidents of its exercise shall be prescribed by the legislature. Neither is it essential that the act of the legislature, or an ordinance made under its authority, should expressly state that the contemplated improvement is necessary, (Elliott, Roads & S. 385;) nor is it required that the act should expressly declare that the assessments are to be made according to the benefits conferred. Both of these are implied from the very nature of this species of taxation, and that this is so is apparent from the action of the court in upholding such assessments under acts which make no reference to such particulars. Cain v. Commissioners, supra; Shuford v. Commissioners, supra; Busbee v. Commissioners, supra.

Viewed in this light, we can see no objection to the ordinance under consideration. It very clearly provides for a taxing-district, to-wit, "Fayetteville street, between Morgan and Martin streets," and it further provides that upon the failure of the abutting owners to comply with its requirements the city may make the designated improvements at the cost of $1.20 per square yard. This provision as to the cost, which is found by the court to be reasonable, very plainly implies that the expense of the improvement in the entire district had been previously estimated; and thus we have an apportionment between the abutting owners and the city, (the latter paying one-third,) and also an apportionment as to the remaining two-thirds between the abutting proprietors according to the frontage. No objection is urged as to the apparently equitable adjustment between the city and the abutting owners, but it is insisted that the frontage rule is an improper method of ascertaining the benefits which inure to the respective lots, and that these should be estimated by the actual appraisement of each.

We have seen that such assessments are based upon the principle of benefits to the abutting property, but the manner of estimating such benefits is not confined to actual appraisement by appraisers appointed for that purpose. This would seem to be a very fair and equitable rule, but its practical working in some instances has led to injustice; and if the legislature, acting, as it is presumed to do, upon information as to the situation and character of the property, the depth of the lots, etc., chooses, in effect, to make an appraisement itself by the adoption of a standard like the frontage rule, it is not easy to understand why, in such cases, the same measure of justice may not be attained. In Hammett v. Philadelphia, 65 Pa. St. 155, it was said by Judge Sharswood, delivering the opinion, that "perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities of the lots differing in situation and depth. Appraising their market values, and

fixing the proportions according to these, is a plan open to favoritism or corruption, and other objections." Even where the latter rule is adopted the buildings should be excluded from the valuation, "as the improvements," says Judge Cooley, "while increasing largely the market value of land, do not usually perceptibly increase the value of the buildings erected upon it." Cooley, Tax'n, 649.

If the buildings are not to be considered, (and this is undoubtedly true), we can very readily conceive how the frontage rule may be quite as efficacious as any other in ascertaining the benefits—that is, the enhanced pecuniary value—where, from the similarity in situation, etc., of the different lots, there can be no gross inequalities. The same eminent authority also states (page 638) that the two methods of assessing benefits, between which a choice is usually made, is by assessors or commissioners appointed for that purpose, or by "an assessment by some definite standard fixed upon by the legislature itself, and which is applied to the estates by a measurement of length, quantity, or value." In speaking of assessments by the front foot, he says (page 644) that "such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice, but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits,—much more than value could be,—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may be lawfully made the basis of apportionment."

Similar language is also used by the same author in his work on Constitutional Limitations, (506,) and cited with approval in Wilmington v. Yopp, supra. In the well-considered work on Roads & Streets, (396,) by Elliott, it is said that "the system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved, and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot-owner an unjust portion of the burden." The principle is also fully sustained by the following authorities, which are only a part of the large number that might be cited. Burroughs, Tax'n, 469; 2 Dill. Mun. Corp. §§ 752, 761, 809; 2 Desty, Tax'n, 1263; Pennock v. Hoover, 5 Rawle (Pa.) 291; Magee v. Com., 46 Pa. 358; Covington v. Boyle, 6 Bush (Ky.) 204; State v. Elizabeth, 30 N. J. Law, 365, 31 N. J. Law, 547; State v. Fuller, 34 N. J. Law, 227; Wilder v. Cincinnati, 26 Ohio St. 284; Parker v. Challis, 9 Kan. 155; Neenan v. Smith, 50 Mo. 525; Whiting v. Quackenbush, 54 Cal. 306; Palmer v. Stumph, 29 Ind. 329; Allen v. Drew, 44 Vt.

174; Motz v. Detroit, 18 Mich. 495; King v. Portland, 2 Or. 146; Cleveland v. Tripp, 13 R. I. 50; White v. People, 94 Ill. 604; Sheley v. Detroit, 45 Mich. 431, 8 N. W. Rep. 52. * * *

It is insisted, however, with much earnestness, that, conceding that the ordinance prescribes a valid method of apportionment, still it cannot be sustained unless the power to make it is conferred by the legislature, and that such power has not been conferred upon the city of Raleigh. This position is founded upon the idea that the charter does not create or authorize the creation of a taxing-district, but simply charges the abutting owner with the whole cost of the improvement in front of his lot, and that, there being an absence of authority to make any apportionments according to benefits, the ordinance is void. The imposition of such a charge has been condemned by some authorities and sustained by others. Without pausing to determine how this may be, and conceding, for the purpose of the discussion, that the charter bears the construction insisted upon, and that such an assessment is for that reason invalid, we are nevertheless of the opinion that the ordinance is fully supported by legislative sanction. In chapter 62, § 3803, of the Code, ("Towns and Cities,") it is provided that the commissioners or aldermen "may cause such improvements in the town to be made as may be necessary, and apportion the same equally among the inhabitants by assessments of labor or otherwise." Here we have a very comprehensive power granted the commissioners or aldermen for the improvement of streets; and the authority to apportion the cost of the improvement is not only implied by the power to make "assessments," (And. Law Dict.; Bouv. Law Dict. "Assess,") but is expressly conferred.

Now, if it be granted, as we think it should be, that the general act is deficient, in that it does not provide for the enforcement of such assessments against abutting real property, still it is good as far as it goes, and is not repealed by the charter as amended, unless inconsistent therewith. Code, § 3827. If it be said that the charter conflicts as to that part which requires the whole cost to be charged against the abutting property without any apportionment, and if, as contended, such a provision is void, it would be impotent to work a repeal of that part of the general act which does authorize such apportionment. If it does not conflict, then, of course, the general act may supplement the special act, and the two may be construed in pari materia. So, taking it either way, the authority to apportion the cost according to benefits, as provided in the ordinance, would be supported; and the power to collect the assessments being expressly granted, and the manner of collection prescribed, it must follow that, in the total absence of anything to show an abuse of power or any gross inequalities, the assessment in question may be enforced.

We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. * * * Reversed.

PALMER v. CITY OF DANVILLE.

(Supreme Court of Illinois, 1894. 154 Ill. 156, 38 N. E. 1067.)

Petition by the city of Danville for the confirmation of a special tax levied by the authority of the city council to pay the cost of providing and putting in sewer and water service pipes for house connections with the main sewer and water pipes in Main street in said city. L. T. Palmer and others filed objections. There was judgment of confirmation, and the objectors bring error.

CARTER, J.[13] * * * It is objected that the special tax was "not levied by any rate of equality upon the real estate situated upon the said Main street, by or in proportion to frontage, value, area, or otherwise, but has been unequally and unjustly levied"; also that the city had no power to levy the special tax to pay for said improvement under article 9 of the act of 1872.

The record shows that the street was 54 feet wide between the curbing; that the street railway track occupied the center; that the sewer main was laid along the south side, about 10 feet from the curb, and the water main along the north side of the street. These house connection pipes extended from the respective mains, each way, across the street, to the curbing, and no further; so that upon the south side of the street the sewer-service pipes were 10 feet, and the water-service pipes 42 feet, long, while on the north side the sewer pipes were 44 feet, and the water pipes 14 feet, long. The cost of putting in these sewer and water connections on the south side of the street, and of assessing and collecting the tax therefor, and for which the assessment was confirmed, was $30.52 for each house or lot, while on the north side the amount was $50.07. So that a lot on the north side of the street, having the same frontage, area, value, and receiving the same benefits from the improvement as a lot on the south side, was assessed a much larger amount. This was done in accordance with the provisions of the ordinance, and the question is directly presented whether the city had the power to assess the cost of each lateral service pipe against the lot with which it was intended to connect, instead of apportioning the entire cost of the improvement among the several lots and parcels of land contiguous to or abutting upon the improve-

[13] The statement of facts is rewritten and part of this opinion and all of the concurring opinion of Bailey, J., are omitted.

ment, upon some principle or rule of equality, such as the frontage, area, or value of the respective lots.

Counsel for the city says that: "This assessment was made upon each lot with reference only to the cost of the pipe leading thereto. Each lot was assessed for its special connection, and the committee's estimate was made on that basis." That "while the improvement was a general one, in one sense, in another it was several as to each lot,"—and insists that it would be unequal and unjust to require the property owner on the south side of the street, requiring only 10 feet of pipe to connect with the sewer, to pay as much for this local improvement as the lot owner on the north side of the street, requiring 44 feet of pipe to connect his lot with the sewer.

It will be noticed that the ordinance provides that the special tax is to be levied and collected in accordance with article 9 of the act of 1872, which vests the corporate authorities of cities and villages "with power to make local improvements by special assessments or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe." This ordinance prescribed that this improvement should be made by special taxation, and directed that a special tax be assessed upon the respective tracts and pieces of land for which the service pipes were to be respectively provided, and which abut upon such service pipes, equal to the cost of furnishing and laying the same. The power conferred to levy this special tax is referable to the power of taxation, and must be strictly construed. By the ordinance the city created a district composed of the property contiguous to the improvement, for the purpose of levying the special tax to make the improvement. Cooley, Tax'n, 143, 151, 152; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69; Davis v. City of Litchfield, 145 Ill. 322, 33 N. E. 888, 21 L. R. A. 563. The basis on which the power to levy special assessments or special taxation on property contiguous or adjacent to the improvement, to pay for its construction, rests on the benefits which it is considered will inure to such property by the making of the improvement. City of Bloomington v. Chicago & A. R. Co., 134 Ill. 459, 26 N. E. 366, and cases cited; Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962; Davis v. City of Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563; Kuehner v. City of Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774.

So clearly is this founded on just legal principles, and generally understood, that these assessments or taxes are often called "benefits." In the levy of special taxes to make local improvements under article 9 of our statute, while the question of benefits is one that must be addressed to the city council, and the decision of the council is not generally open to review by the courts, but is final, yet

it is clear, both upon principle and authority, that for unreasonableness, arbitrary abuse of power, or violation of the fundamental principles upon which the power of taxation rests, the validity of such an ordinance, as well as all proceedings under it, may be attacked in, and passed upon by, the courts. Cooley, Tax'n, 619, 622, and cases cited; Craw v. Village of Tolono, 96 Ill. 261, 36 Am. Rep. 143; City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366; Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962; Davis v. City of Litchfield, 145 Ill. 326, 33 N. E. 888, 21 L. R. A. 563. In the case last cited an ordinance of the city of Litchfield was by this court declared invalid, where it provided that the cost of the improvement—the paving of a street—should be apportioned and assessed against the abutting property according to frontage, but the assessment against each lot was to be only the amount of the improvement in front of any such lot. It was there said that the ordinance had the effect of creating a taxing district composed of the property contiguous to the improvement, and that assessing each lot with the cost of paving the street in front of it was "not the imposition of a special tax upon contiguous property, but an arbitrary imposition of the burden upon each lot of making the improvement in front of it," and that "it is of the essence of a tax that it shall be levied for a public purpose, and shall be uniform in respect to persons and property within the taxing district, whether that be the state, county, municipality, or district thereof created for local improvement, and that it be laid according to some fixed rule of apportionment," and that "equality of the burden is of the very essence of the right." See, also, 1 Desty, Tax'n, 29; Dill. Mun. Corp. 587. "The district having been established by ordinance, the tax is to be imposed upon some rule of apportionment which shall, in theory at least, conform to and be productive of uniformity in its levy." Davis v. City of Litchfield, supra. The ordinance, and proceedings under it, involved in the case at bar, contain the same vice for which the ordinance in the Litchfield Case was declared void.

Should it be said that there was equality and uniformity in the levy of the tax, as to property situated on the same side of the street, and that it would be unjust to make those situated nearer the sewer contribute to the expense of the connections of those situated on the other side of the street, and further away, it is a sufficient answer to say that the ordinance required the cost of connecting each lot to be assessed against such lot, and the mere circumstance that the location of the main sewer was such that it required less expense to make the connection on one side than on the other could not be urged as a sufficient reason for violating the rule of equality and uniformity which should have been observed. Nor would there be any injustice in assessing the lots on

the south at the same rate as on the north side, for, as we have seen, the levy of the tax must have been based on the benefits accruing to the property from the making of the improvement; and, while the question of benefits was one for the city council to decide, it could not arbitrarily decide and ordain in the same ordinance that the property on the south side of the street was benefited in a greater degree by these lateral service pipes than the property on the north side, simply because the main sewer was laid on the south side. Nor did the ordinance so declare. It provided for levying the cost on each lot of putting in the service pipe connecting it with the sewer and water mains, without regard to the proximity of the lot to the main, and without regard to the length of pipe required to make the connection. If, for any reason, such as the length of the pipe, obstructions in the way of placing it, or other cause, one of these service-pipe connections cost more than another, the assessment must, under the ordinance, have been made accordingly.

The contention of defendant in error in support of the judgment, based on the alleged injustice of requiring the lot owner who needed only 10 feet of pipe to connect his lot with the sewer to contribute to the cost of his opposite neighbor's connection, which required 42 feet, is an argument against the policy of constructing such an improvement by special taxation. In Holt v. City of East St. Louis, 150 Ill. 530, 37 N. E. 927, this court said, "The object of special taxation is not to have each lot pay for the actual cost of what is done in front of it, but its proportionate share of the whole." Judge Cooley, in his work on Taxation (page 646), in speaking of the method of requiring each lot to pay for the improvement in front of it, says: "Instead of establishing a taxing district, and apportioning the cost throughout it by some standard of benefit, actual or presumptive, the case of each individual lot fronting on the improvement has been taken by itself, and that lot has been assessed with the cost of the improvement along its front, or perhaps with one-half the cost, leaving the opposite lot to be assessed for the other half. If such a regulation constitutes the apportionment of a tax, it must be supported, when properly ordered by or under the authority of the legislature.

But it has been denied, on what seems the most conclusive grounds, that this is permissible. It is not the legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not

at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But, whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. * * * In sidewalk cases, a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively." He further says that such levies are not taxes, but forced contributions, and that a local tax for a local benefit should be distributed among and imposed upon all equally standing in a like relation.

In the view we take of this case, the decision must be the same whether the principal question at issue involves a lack of municipal power, or an abuse of power conferred. The city council could not provide for the construction of this improvement by special taxation, and then ignore the very principle on which such taxation is based. The work must be regarded as an entirety, and its cost apportioned and assessed, on some principle of equality and uniformity, on all of the contiguous property; that is, on all the lots and parcels of land in the taxing district. St. John v. City of East St. Louis, 136 Ill. 214, 27 N. E. 543, and cases cited.

But it is urged that the general law for the incorporation of cities and villages confers power on the city "to construct and keep in repair, culverts, drains, sewers, and cess-pools and to regulate the use thereof," and, in addition, that the city has general police powers which enable it to do all acts necessary for the preservation and maintenance of the public health. These general powers cannot, however, be carried into effect by means of special taxation. In City of Chicago v. Law, 144 Ill. 575, 33 N. E. 855, it was held the city had no power to raise money by special assessment to enable it to carry into effect its general powers enumerated in the Municipal Code, and that the power of taxation by special assessment cannot be exercised by a city unless it has been expressly conferred by the legislature. No one will, we presume, contend that the legislature has conferred authority on the city to enforce its general police powers by special taxation or by special assessment. If it be said that the city may compel the lot owner, at his own expense, to construct sidewalks in front of his premises, and thus a local improvement may be constructed, and the cost so apportioned that each property owner may pay for the sidewalk in front of his lot, the reply is that express authority is, by statute, conferred on cities and villages to cause sidewalks to be so constructed. 1 Starr & C. Ann. St. 541, 542. We have not been referred to any provision of the statute, and we know of none, vesting power in cities and villages to cause sewers to be laid or constructed, and the cost of constructing the same in front of each lot arbitrarily

imposed on such lot, or its owner, without regard to frontage, area, or value.

The views here expressed are not in conflict with the decision of this court in White v. People, 94 Ill. 604. There the statute expressly authorizing cities to compel lot owners to construct sidewalks in front of their lots was quoted, and the constitutional and statutory provisions relating to the making of local improvements by special assessments or by special taxation of contiguous property, or otherwise, were referred to, and it was held that the city of Bloomington had the power to assess each lot with the whole cost of constructing the sidewalk in front of such lot; in other words, the statute expressly conferring the power was held constitutional. Whether the legislature may or may not, under the general police power, or the power relating to local improvements, vest the corporate authorities of cities and villages with power to require, by ordinance, that each lot shall be connected by service pipes with the sewer and water mains in front of it, and that the entire cost of such connection shall be assessed against such lot, it is not now necessary to decide; but it seems clear that such power has not been conferred by the statute under which this ordinance was passed, and the improvement ordered and made.

Our attention is called to Warren v. City of Chicago, 118 Ill. 329, 11 N. E. 218, as authority in support of the validity of the ordinance in question. In that case a special assessment was levied on each lot to pay the cost of the service pipe put in to connect it with the water main. The assessment on lots on one side of the street was more than on the other, but, as the appellant who objected to the assessment owned an equal number of lots on each side of the street, the question here considered was immaterial to him, and apparently was not raised; but the judgment of confirmation was reversed on the ground that the ordinance unjustly discriminated against the appellant, by arbitrarily dividing his lots so that he was required to pay for putting in a greater number of service pipes in proportion to frontage than the other property owners. There is no conflict between the decision in that case and the views here expressed. * * * Judgment reversed.

POLICE POWERS AND REGULATIONS

I. Extent and Limitation of Power [1]

COOMBS v. MacDONALD.

(Supreme Court of Nebraska, 1895. 43 Neb. 632, 62 N. W. 41.)

Action by Henry Coombs and others, on behalf of the citizens of Omaha and all others desiring to become parties, against Alexander MacDonald and others, the mayor and board of health of the city of Omaha, and the city council of the city of Omaha. Judgment for complainants, and defendants appeal.

POST, J.[2] This is an appeal from a decree of the district court for Douglas county, and involves the contract for the removal of the garbage of the city of Omaha, which was the subject of the controversy in Smiley v. MacDonald, 42 Neb. 2, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684. By the decree appealed from, said contract, as well as the ordinance upon which it depends, was adjudged void, and the defendant MacDonald, as contractor, perpetually enjoined from interfering with the plaintiff, also engaged in the business of removing garbage from said city. The grounds upon which said contract is assailed in the petition of plaintiffs are: First, that it was procured through bribery and other unlawful and corrupt means by MacDonald and others interested with him; second, that, in so far as it purports to confer upon the contractor the exclusive right to remove the garbage of the city, it contravenes the settled rules of public policy, and is therefore void. The district court sustained the latter contention only. * * *

2. Aside from the allegation of fraud, the pleadings herein present no question which was not considered in Smiley v. MacDonald. It is true that, in the case named, the contract was assailed on the ground that the right conferred thereby was an exclusive franchise, and therefore within the inhibition contained in section 15, art. 3, of the constitution; while in the case before us, as we have seen, the contention is that said contract is void as against public policy. Counsel for defendants have cited numerous cases which assert the common-law doctrine that monopolies are odious, and therefore illegal. But they refer without exception to franchises and agreements in restraint of trade, and can have no application to mere police regulations, designed to promote the health or mo-

[1] For discussion of principles, see Cooley, Mun. Corp. § 95.

[2] Part of the opinion is omitted.

rality of the general public. Almost every phase of the subject was discussed in the celebrated Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, and 111 U. S. 764, 4 Sup. Ct. 652, 68 L. Ed. 585, to which an extended reference is made in the brief of defendants; and the doctrine therein announced fully sustains our conclusion in Smiley v. MacDonald. Indeed, there was in those cases no diversity of opinion among the judges with respect to the authority of a state in the exercise of its police power to confer upon an individual or corporation a privilege in its nature exclusive. On the other hand, the dissent of the nonconcurring judges was placed upon the ground that the claim of a sanitary regulation was a mere pretense, under which the state of Louisiana had attempted to invade private rights, and to deny to its citizens the privilege of engaging in a lawful business in no wise affecting the public health or morals.

As intimated in Smiley v. MacDonald, the choice between sanitary measures is a function of the legislative department of the government, which the courts will not assume to control. The test, as therein remarked, where a particular measure is called in question, is whether it has some relation to the public welfare, and whether such is in fact the end sought to be attained. * * * Reversed.

II. Peace and Order [3]

CITY OF CHARITON v. SIMMONS.

(Supreme Court of Iowa, 1893. 87 Iowa, 226, 54 N. W. 146.)

The defendants were arrested upon warrants issued by the mayor of the plaintiff city upon informations charging them with violating an ordinance of the city. The defendants were taken before the mayor, and entered pleas of not guilty. A trial was had, and they were found guilty, and judgment was entered against each of them in the sum of $10 and costs. They appealed to the district court, where, by agreement, the pleas of not guilty were withdrawn, and the defendants demurred to the informations. The demurrer was sustained, and the plaintiff city appeals.

ROTHROCK, J. The ordinance under which the arrests were made and trial had was, by agreement, made part of the record, and the demurrer was sustained upon the ground that the ordinance was invalid. The ordinance in question, so far as it pertains to the question involved, is as follows:

"First. That the collection or congregation of persons upon the

[3] For discussion of principles, see Cooley, Mun. Corp. § 98.

streets or sidewalks of the city, and the marching or movements of persons in crowds or processions thereon, at such times and places, and in such numbers and manner, as to obstruct or impede public travel thereon, or to injuriously affect or interfere with the business of any person or persons on such streets, is hereby prohibited; and it is hereby made the duty of the mayor and city marshal to order all such congregations or processions of persons to quietly disperse; and the failure or refusal of any person or persons to promptly obey such order of the mayor or city marshal shall be deemed a misdemeanor, and, upon conviction thereof, such person or persons shall be fined in any sum of not less than one dollar and not more than fifty dollars, in the discretion of the court, and shall be imprisoned in the county jail until such fines and costs of prosecution are paid.

"Second. That the making of any noise upon the streets or sidewalks of the city, by means of musical instruments or otherwise, of such character and extent, and at such times and places, as would likely cause horses and teams to become frightened and ungovernable, or of such character, extent, and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and city marshal to order any person or persons making such noise to desist therefrom, and the failure or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby declared to be a misdemeanor, and, upon conviction thereof, such person or persons shall be punished by a fine of not less than one dollar and not more than fifty dollars for each offense, in the discretion of the court, and shall be imprisoned in the county jail until such fines and costs of prosecution are paid."

The grounds of demurrer are that this ordinance is unreasonable and unjust, and prescribes a penalty, not for the violation of an ordinance, but for the refusal to obey an order of the mayor or city marshal.

It is important to first determine whether the acts sought to be prohibited by the ordinance are such as the city may punish by ordinance. We do not understand counsel to claim that collections and congregations of "persons upon the streets or sidewalks of a city, and the marching or movements of persons in crowds or processions thereon," may not, under certain circumstances and conditions, be prohibited. It is not the orderly procession, with flags and banners, musical instruments, and all the accompaniments, so often seen upon the streets of our cities and towns, by our civic societies, by political parties, and not infrequently at funerals, which this ordinance prohibits. These processions are everywhere not only permitted, but encouraged. But suppose these processions should for an unreasonable time obstruct travel on the streets, or injuriously affect business, and be carried on to

such an extent and for such time as to be an annoyance and a nuisance to the public, there can be no question that the city may by ordinance prohibit them, and punish the persons making such an unreasonable disturbance. If the ordinance involved in this controversy were a sweeping prohibition of all processions, parades, and all riding and driving upon the public streets of the city with bands of music, flags, torches, and other paraphernalia of the modern street parade, there can be no doubt that the ordinance would be unreasonable, unjust, and invalid. Within proper limits, the city has the power to "prevent riots, noise, disturbance, or disorderly assemblages, * * * and to preserve peace and order therein." Code, § 456.

We do not understand counsel for the defendants to question these general propositions. The real objection which they urge to the ordinance is that the offense is made to depend upon the whim or caprice of the mayor or city marshal. It is true that under the ordinance, when persons are arrested and brought for trial, it is incumbent on the prosecution to show by evidence that the order to desist from making the disturbance was given by the mayor or city marshal. But it is also incumbent on the prosecution to prove that the person or persons charged were guilty of doing the prohibited acts. This is the gravamen of the charge. Evidence that the order to desist was given, without more, would not authorize a conviction.

We are aware of no case determined by a court of last resort which is exactly in point upon the question under consideration. In Re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310, it was determined that an ordinance absolutely prohibiting street processions with musical instruments, banners, torches, etc., or while singing or shouting, without the consent of the mayor first obtained, was unreasonable, and therefore invalid. In that case the offense consisted in failing to obtain the consent of the mayor before the procession or performance began. In the case at bar persons are not prohibited from putting a procession in motion. The prohibition extends to such a display as causes a public annoyance. So in the case of Mayor of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239, it was held that an ordinance which provided that permits for steam boilers and engines might be revoked and removed after six months' notice from the mayor, and any one receiving such notice, who refused to comply therewith, should pay a fine, was held to be unreasonable. This was an unwarrantable and unreasonable interference with the prosecution of a legitimate business, and depended upon the mere caprice of the mayor. In the case at bar, as we have said, the offense consists in doing acts which are everywhere regarded as subject to municipal control.

Other cases are cited by counsel, but it appears to us that they are clearly distinguishable from the case at bar. On the other

hand, in the case of Com. v. Davis, 140 Mass. 485, 4 N. E. 577, an ordinance providing that "no persons shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the common or public grounds," it was held that the ordinance was not unreasonable and invalid. The committee referred to in the ordinance was the committee of the city council having charge of the public grounds. See, also, Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

In our opinion, the ordinance in question is not unreasonable. It is applicable to all persons who, by violating its provisions, subject themselves to its penalties; and the mere fact that no arrest can be made unless the mayor or marshal shall order the offender to cease from violating the ordinance, instead of being oppressive on the citizen, operates as a warning to him to desist from a violation of the ordinances. He should not be heard to complain of this feature of the ordinance. The order of the district court sustaining the demurrer to the information is reversed.

III. Sanitation [4]

LAUGEL v. CITY OF BUSHNELL.

(Supreme Court of Illinois, 1902. 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266.)

Action by the City of Bushnell against J. E. Laugel for violation of a city ordinance. Judgment for plaintiff having been affirmed by the appellate court (96 Ill. App. 618), the defendant brings error.

BOGGS, J.[5] * * * The ordinance said to have been violated is as follows: "Be it ordained by the city council of the city of Bushnell: Section 1. That any place in said city of Bushnell where hop ale, hop mead, malt mead, cider or other like drinks are kept for sale, are sold or given away, either directly or indirectly, in any quantity whatever, is hereby declared to be a nuisance, and the owner, keeper, lessee or occupant of the premises who shall neglect or refuse to abate such nuisance after being notified so to do by the city marshal of said city, shall, on conviction thereof, forfeit and pay to said city a sum not less than ten dollars nor more than one hundred dollars for each and every day he shall refuse or neglect to remove or abate the same." In the circuit court the parties waived a jury, and submitted the cause to the

[4] For discussion of principles, see Cooley, Mun. Corp. § 99.

[5] Part of the opinion is omitted and the statement is rewritten.

court for decision. When the ordinance was offered in evidence counsel for the plaintiff in error objected to the introduction thereof, assigning as the ground of objection "that the city had no power to pass it." But the court overruled the objection, and the plaintiff in error excepted. This ruling, and the action of the court in refusing to hold as correct propositions of law Nos. 1, 2, and 3, presented in behalf of the plaintiff in error to be held as the law of the case, constitute the chief grounds of complaint in this court, and together raise the same question.

Said propositions are as follows: (1) "The ordinance offered in evidence is void." (Refused.) (2) "The city council has no power to declare by ordinance that where hop ale, hop mead, malt mead, cider, or other like drinks are kept for sale, are sold or given away, either directly or indirectly, in any quantity whatever, is a public nuisance." (Refused.) (3) "No city council of any city in this state organized under the general law has the power or authority to declare, by ordinance or otherwise, that where hop ale, hop mead, malt mead, cider, or other like drinks are kept for sale, are sold, or given away, either directly or indirectly, in any quantity whatever, to be a public nuisance, regardless of the character of such drinks or the ingredients thereof." (Refused.)

The argument of counsel for plaintiff in error is correct that the authority which the governing bodies of cities and villages may exercise by virtue of subdivision 75 of section 62 of article 5 of chapter 24 of the Revised Statutes, entitled "Cities," etc., "to declare what shall be a nuisance and to abate the same and to impose fines upon persons who may continue or suffer nuisances to exist," is not as broad and unrestricted as the language of the grant of power would indicate. If interpreted according to its literal wording, the act invests the councils of cities and the trustees of villages with ample power to conclusively declare any and every trade, occupation, calling, or thing to be a nuisance and to abate it as such. The possession of such unlimited power would subordinate every business interest, however lawful, to the uncontrolled will of municipal authorities, and its exercise would result in unjustifiable invasion of private right.

We do not conceive it to be the law that city councils or boards of village trustees may conclusively declare that to be a nuisance which a court, acting upon its experience and knowledge of human affairs, would say is not so in fact. That which, however, is a nuisance because of its nature or inherent qualities, or because it is forbidden by law, may be denounced or declared a nuisance by an ordinance, and such denunciation will be deemed conclusive. There are other things, trades, occupations, and callings which, because of their nature or inherent qualities, may or may not be nuisances in fact. As to this class we said in North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207, 44 Am. Rep. 788, "that,

if it be doubtful whether a thing is in its nature a nuisance,—that is, whether it is in fact a nuisance,—the determination of the question requiring judgment and discretion on the part of the village authorities in exercising their legislative functions under the power delegated by the enactment we are considering, the action of such authorities should be deemed conclusive of the question."

It is thought the doctrine thus announced as to the power of city councils is in conflict with the holdings of this court in the later case of Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524, and should therefore be regarded as overruled. But in the still later case of Harmison v. City of Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893, the doctrine of the case of North Chicago City Ry. Co. v. Town of Lake View was reaffirmed. In the Lake View Case, we held that the city council or board of trustees were not clothed by the enactment in question with power to declare that a nuisance which is not so in fact, and we further said: "There are some things which are in their nature nuisances and which the law recognizes as such. There are others which may or may not be, their character in this respect depending on circumstances, and in the latter instance it is manifestly beyond the power of the village to declare in advance that those things are a nuisance. The question when a thing may or may not be a nuisance must be settled as one of fact, and not of law."

The supposed conflict in the expressions of the court in the two cases is apparent only. It is true that in the Lake View Case it was said that the question when a thing may or may not be a nuisance must be settled as one of fact, and not of law, while in the former case it was said: "In doubtful cases, where things may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering, their action under such circumstances would be conclusive of the question." In the Lake View Case we also said: "There are some things which are in their nature nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending," not upon their nature or inherent qualities, but, to quote again, "upon circumstances." It was this latter class which were not nuisances in their nature, but which might become so by reason of exterior circumstances, such as location, surroundings, manner of conducting the business, etc., to which we referred in the latter case, and declared could not be conclusively denounced as nuisances by village or city authorities, but that the question as to them should be determined as one of fact, but not of law.

As to things, trades, occupations, or establishments falling within the other class,—that is, those which in their nature or inherent qualities may or may not be nuisances,—the expression used in the Lake View Case is not inconsistent with the doctrine of the former case that such things may be conclusively denounced as nuisances. Nuisances may thus be classified: First, those which in their nature are nuisances per se or are so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so. With these distinctions kept clearly in view, no difficulty will be found in harmonizing the decisions in question.

Nor is the view that city councils and village trustees have power to declare that a nuisance as to which it may be doubtful whether it is or not a nuisance at all inconsistent with the declaration in Emmons v. City of Lewistown, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540, that to concede that the power of a municipal corporation to pass an ordinance is doubtful is to deny the power. In that case the question was presented whether the city of Lewistown had power to adopt an ordinance to license, tax, or regulate the canvassing for books and publications in the city. It was contended on behalf of the city that subdivision 41 of section 62 of chapter 24 of the Revised Statutes, entitled "Cities," etc., invested the city council with power to adopt the ordinance. Said subdivision 41 does not expressly grant power to license, tax, and regulate persons engaged in canvassing for books or publications, but does authorize such course to be pursued as to hawkers and peddlers. It was in connection with the discussion of the question whether persons engaged in canvassing for books and other publications were included in the class of persons denominated "hawkers and peddlers" in the ordinance that the expression in question was used. The doubt referred to was as to the power of the city council to pass any ordinance in any wise restricting or regulating the canvassing for the sale of books and other publications within the city, and the court correctly remarked that to concede that it was doubtful whether the legislature had granted such power was to deny the existence of the power. In the case at bar the grant of legislative power to declare what shall

be a nuisance and to abate it is expressly given, and no doubt exists as to the power of the city council over nuisances. The doubt is not as to the power possessed by the council to control nuisances, but as to the nature or inherent qualities of the thing, calling, or occupation denounced as a nuisance. In the Emmons Case the doubt was whether there was any power in the city council to control the business of canvassing for books and publications, etc.

Section 7 of chapter 43 of the Revised Statutes, entitled "Dramshops," declares all places where intoxicating liquors are sold in violation of the act shall be taken and held to be common nuisances. In Hewitt v. People, 186 Ill. 336, 57 N. E. 1077, we affirmed a conviction of the violation of the dramshop act in the selling of cider, it appearing from the evidence that the cider sold was intoxicating in character. In the case at bar the evidence tended to show that hop ale was an intoxicating drink. Clearly, we cannot assume to say that it is not at least doubtful whether cider, hop ale, hop and malt mead are not intoxicating. The city council, in the exercise of their judgment and discretion in discharging their legislative function, determined that places where hop ale, hop and malt mead, or cider was sold were nuisances, and, that determination not being free from doubt, the courts must refrain from declaring the ordinance void and ineffectual. The court did not err in admitting the ordinance in evidence or in ruling on the propositions of law. The admission of testimony bearing upon the question whether hop ale contained alcohol, and would produce intoxication, cannot afford any reason for reversing the judgment. The declaration of the city council that a place where such ale is sold shall be regarded as a nuisance is, as we have seen, conclusive; hence proof as to the intoxicating character of the ale, though unnecessary to the case for the city, could not have prejudiced the cause of the plaintiff in error. * * * Affirmed.

IV. Safety [6]

STATE v. JOHNSON.

(Supreme Court of North Carolina, 1894. 114 N. C. 846, 19 S. E. 599.)

Defendant Johnson was occupying and controlling a two-story wooden frame house, with brick basement, situated in the city of Winston, within 1,000 feet of the Court square; and about the 9th of December, 1892, the house was partially destroyed by fire.

[6] For discussion of principles, see Cooley, Mun. Corp. § 100.

On the 6th of January, 1893, the defendant made a contract with certain builders to have the house repaired at the cost of $490. The original cost of the building, including brick basement, was about $2,000. Shortly after work began under said contract, the defendant was arrested, tried and convicted before the mayor, and on appeal to the superior court the case was dismissed, on motion to quash the warrant. About the 17th of March, 1893, the defendant, without the consent of the board of aldermen, placed said contractors at work again on the building; and he was again arrested, and tried, convicted and fined.

The following ordinances relating to this matter were adopted by said board: "That for the protection of the city against fire the following ordinance be enacted under chapter 5, as sections 36 and 37 of said chapter 5 of the ordinances of the city: Sec. 36. That the fire limit shall be the territory from the center of Court square extending one thousand feet in each direction; that it shall be unlawful without the consent of the board for any person or corporation to erect, alter or repair any wooden building within said fire limit, and any person or corporation violating the same shall be fined fifty dollars; that for each day such person or corporation continues to erect, alter or repair such building, it shall constitute a separate violation of the ordinance," etc. "Sec. 37. That any person who shall assist in constructing or repairing any building, prohibited in above section, shall be fined," etc. There were other sections of the ordinances, prohibiting the erection of wooden buildings in the business portion of the city without the written consent of the aldermen, etc., and the fire limit—1,000 feet from the Court square—was established, etc.

The defendant appealed from the judgment.[7]

Avery, J. Municipal corporations are the creatures of the legislature, and their powers may be curtailed, enlarged, or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no statute will be enforced which impairs the obligation of a contract, interferes with vested rights, or is in conflict with any provision of the organic law of the state or nation. It is too well settled to recapitulate, or even justify discussion, that towns,—certainly, by virtue of an express grant of authority to do so, and, according to most authorities, by implication arising out of the general welfare clause,—if there is no general law to the contrary, are empowered to prescribe a fire limit, and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe. 15 Am. & Eng. Enc. Law, 1170; 1 Dill. Mun. Corp. § 405; Horr & B. Mun. Ord. § 232; Klingler v. Bickel, 117 Pa. 326, 11 Atl. 555. The weight of authority seems to be also in favor of the proposition that the legisla-

[7] The statement of facts is rewritten.

ture has the power to prevent the erection of wooden buildings in such corporations, or to delegate to the municipalities, the authority to do so, even where the enforcement of the law or ordinance causes a suspension of work in the erection of structures of this kind by persons who are carrying out contracts for their erection made previously with the owners of the land. Cordes v. Miller, 39 Mich. 581, 33 Am. Rep. 430; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310. Persons, in contemplation of law, contract with reference to the existence and possible exercise of this authority, when it is vested in the municipality. City of Salem v. Maynes, 123 Mass. 374; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Woodlawn Cemetery v. Everett, 118 Mass. 354; Com. v. Intoxicating Liquors, 115 Mass. 153; Knoxville Corp. v. Bird, 12 Lea (Tenn.) 121, 49 Am. Rep. 326.

Upon this same principle, all agreements for building are deemed to be entered into in view of the contingency that such power may be granted by the legislature, when it has not already been delegated, while the contract is still in fieri. 15 Am. & Eng. Enc. Law, 1171. While it might be unreasonable to prohibit even the slightest repairs to wooden buildings standing within the fire limits prior to the passage of a statute or ordinance establishing such limits, the power to prevent repairs is delegated, and presumably exercised, for the protection of property; and, where a wooden structure within the bounds is partially destroyed by a fire already, it is not unreasonable to require a new roof to be made of material less liable to combustion, or to forbid the repairs altogether when the damage to the building is serious, and to that end to compel the owners to give notice to the town authorities of their purpose to repair, and of the character of the contemplated work. Village of Louisville v. Webster, 108 Ill. 414. We are aware that there is much conflict of authority as to the reasonableness of ordinances forbidding all repairs, or the enforcement of them so as to prevent replacing roofs with the same material used before their destruction. Horr & B. Man. Ord. p. 214, § 233; Brady v. Insurance Co., 11 Mich. 425; Ex parte Fiske, supra.

But in this particular instance the legislature has granted a municipality the power to supervise, or prevent the replacing of the roof with another of shingles, instead of constructing one of material less liable to destruction; and we are not prepared to question its authority to do so, since, upon the principle already announced, persons contracting with reference to the chances of the granting as well as the exercise of such powers acquire no vested rights, and afterwards voluntarily incurring all of the risks incident to their situation, have no reason to complain of the loss when it befalls them. The court imposed a fine of $50. There was no attempt to enforce the portion of the ordinance imposing a pen-

alty of $10 for every hour the building was permitted to remain. There may be more doubt as to the reasonableness of that provision. Com. v. Wilkins, 121 Mass. 356.

But it is not necessary to pass upon a question not fairly raised, and we forbear to do so. The judgment is affirmed.

COMMONWEALTH v. CROWNINSHIELD.

(Supreme Judicial Court of Massachusetts, 1905. 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245.)

One Crowninshield was convicted of violating a rule of the board of Park Commissioners, and brings exceptions.

LATHROP, J. The defendant was found guilty of violating a rule of the board of park commissioners of the city of Boston, which provides that "no person shall ride or drive in Commonwealth avenue at a rate of speed exceeding eight miles an hour." At the trial it appeared that the defendant, on November 13, 1903, was running an automobile at a rate of speed exceeding eight miles an hour in Commonwealth avenue between Exeter street and Fairfield street. Many objections were raised in the court below, and come before us on the defendant's exceptions. So much of Commonwealth avenue as lies between Arlington street and the intersection of the avenue with Beacon street was taken for park purposes by the board of park commissioners on June 29, 1894.

1. It is contended that the board of park commissioners never acquired any jurisdiction over the part of Commonwealth avenue where the offense was committed. This depends on the construction to be given to St. 1893, p. 934, c. 300, § 1. This section is as follows: "Any board of park commissioners constituted under the authority of chapter one hundred and fifty-four of the Acts of the year eighteen hundred and eighty-two as amended by chapter two hundred and forty of the Acts of the year eighteen hundred and ninety, or of any special acts, shall have power to connect any public park, boulevard or driveway under its control, with any part of any city or town in this commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park, and shall also have power to accept and add to any such park any street or part thereof which adjoins and runs parallel with any boundary line of the same: provided, that the consent of the public authorities having control of any such street or streets so far as selected and taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such street or streets so far as taken, shall be first obtained." It appears that the public authorities having control of Commonwealth avenue assented to

the selection and taking of the portion of the avenue taken, and that the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on the avenue has been obtained.

The contention of the defendant is that as the board of park commissioners has no control over the Public Garden, which abuts on Arlington street for the entire length of that street, it could not take the avenue for the purpose of connecting the Public Garden with the Back Bay Fens. But we are of opinion that the language of the statute is broader than this. The board of park commissioners is expressly given the power "to connect any public park, boulevard or driveway under its control [in this case the Back Bay Fens] with any part of any city or town in this commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park." The object of the statute was to give a board of park commissioners having jurisdiction of a park in any city or town to take, under the conditions above set forth, any street connecting with that park in the same city or town, and was not limited to the taking of a street connecting two parks. The view which we have adopted is in accordance with that taken by the commissioners on the Revised Laws, and adopted by the Legislature: "Such boards may connect any public park, boulevard or driveway, under its control, with any part of a city or town for which they are appointed by taking any connecting streets or part thereof leading to such park," etc. Report of Commissioners, c. 28, § 3; Rev. Laws, c. 28, § 3.

2. It is next contended that, if the park commissioners had jurisdiction over that part of Commonwealth avenue where the offense was committed, their jurisdiction was limited to acts of maintenance and management, and did not embrace the power to pass the rule in question. But section 3, St. 1893, p. 935, c. 300, reads as follows: "Such boards of park commissioners shall have the same power and control over the streets or parts of streets taken under this act as are or may be by law vested in them concerning the parks, boulevards or driveways under their control." To ascertain the power of the board, we turn to St. 1875, p. 778, c. 185, § 3, which not only gave the board power to take land for parks, and "to lay out, improve, govern and regulate" the same, but also "to make rules for the use and government thereof, and for breaches of such rules to affix penalties not exceeding twenty dollars for one offense." Power is also given to employ a police force. We cannot doubt the power of the board of park commissioners, under the statutes cited, to regulate the speed at which a person shall "ride or drive" in a park or in a street which is within the jurisdiction of such commissioners. In Com. v. Abraham, 156 Mass. 57, 30 N. E. 79, where a rule made by the park commissioners under St. 1875, p. 778, c. 185, § 3, was held to be valid,

it was said in the opinion of the court: "The parks of Boston are designed for the use of the public generally, and whether any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide in the exercise of their discretion." The general question which arises where a by-law or ordinance of a city, or a rule of a board of park commissioners is concerned is whether it is authorized by a statute, and whether it is reasonable. See Com. v. Stodder, 2 Cush. 562, 570, 48 Am. Dec. 679. The rule in question was authorized by statute, and was reasonable. No question has been raised as to the power of the Legislature to authorize the board of park commissioners to make the rule relied upon, and it is evident that such contention, if made, could not prevail. Brodbine v. Revere, 182 Mass. 598, 602, 66 N. E. 607.

3. The next contention is that, if the board of park commissioners had power to pass rules, such power was taken away by subsequent legislation. The argument is that, because St. 1902, p. 235, c. 315, regulated the speed of automobiles throughout the state, it abrogated all park regulations. It is clear, however, that this statute was not intended to apply to park regulations. It refers to the speed of automobiles on public highways, streets, and ways. This act was repealed by St. 1903, p. 512, c. 473, § 15, which contains a clause that "nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law." The reason for this is that the act contains certain general regulations which apply to all automobiles, but section 8, which applies to speed limit only, applies to a public way or private way laid out under the authority of statute.

4. The next contention is that under section 14, St. 1903, p. 511, c. 473, no regulation of the park commissioners shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads. But a reading of the section shows very clearly that the last sentence of the section applies only to special regulations made by boards of aldermen of cities and selectmen of towns, and has nothing to do with boards of park commissioners. The section reads as follows: "Nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law. Boards of aldermen of cities and the selectmen of towns may make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles upon particular roads or ways, including the right to exclude them altogether therefrom. Such exclusion, however, shall be subject to an appeal to the Massachusetts Highway Commission, whose decision in the case shall be final. No such special regulation shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads."

5. The last contention is that the rule of the board of park commissioners is too indefinite to support criminal proceedings. Fault is found with the words "ride or drive," but we are of opinion that a person may be said to be driving an automobile if he is controlling the motive power.

We find nothing else in the case which requires special consideration. Exceptions overruled.

KNOBLOCH v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, 1884. 31 Minn. 402, 18 N. W. 106.)

GILFILLAN, C. J. The only question presented by the appellant on this appeal is as to the validity of an ordinance of the city of St. Paul, as follows: "That no railroad company or corporation, or their agents or employés, shall run a locomotive or train of cars, or single car, within the limits of the city of St. Paul, at a greater speed than four miles per hour," etc. It is claimed that this is in restraint of commerce, and is therefore unreasonable and void.

The facts relied on by appellant to show this, as affecting its line in question, (its short line between St. Paul and Minneapolis,) are: The length of the line is ten miles, of which between three and four miles is within the limits of the city of Minneapolis, (an ordinance of which restricts the speed to six miles an hour,) and three or four miles is within the city of St. Paul, leaving a space of country between the two cities of about three miles; that the running time between the ends of the line in the two cities is 30 minutes, or 20 miles an hour, and that citizens of each city are constantly applying to appellant to reduce the running time; that observance of the ordinances would increase it to more than one and one-half hours; that about 2,400 tons of freight pass over the line daily, and nearly half a million passengers passed over it in the year 1882; that, although the crossing where respondent's cow was killed is within the platted portion of the city, the surrounding country is similar to the open country out of the city, and the street similar to a common country road, there being no graded streets within three-quarters of a mile, and no house within a quarter of a mile, in the direction of the built-up portion of the city. The street seems to have been a good deal traveled.

We do not question the power of the courts to declare an ordinance of a municipal corporation void as in restraint of trade. The mere fact, however, that it operates to restrain trade will not justify such action; for proper police regulation and judicious care for the lives and property of citizens may require such ordinances, although it interferes in some measure with modes of transacting business. An ordinance limiting the speed of railroad trains

through the most densely peopled parts, or across the most thronged streets, of a city interferes with the speedy transaction of business by railroads to the same extent as where it applies to the more sparsely settled portions, or in crossing less frequented streets; but no one would say that an ordinance controlling the speed through such densely peopled parts of the city, or across the busiest streets, is void as in restraint of trade. In addition to its effect in obstructing business, there is the question of its necessity or reasonableness as a proper police regulation. The determination, in the first instance, of that question has been committed by the legislature to the discretion and judgment of the common council. When they have exercised their discretion and judgment, and passed such an ordinance, it is prima facie valid. It must be apparent that to justify a court in setting aside their action its unreasonableness or want of necessity as a measure for the protection of life and property should be clear, manifest, undoubted, so as to amount, not to a fair exercise, but to an abuse of discretion, or mere arbitrary exercise of the power of the council. City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16), 90 Am. Dec. 278; City of Rochester v. Upman, 19 Minn. 108 (Gil. 78). At this time, when it is much the fashion to include within the corporate limits of cities large tracts of surrounding country, there will undoubtedly be portions in which a restriction of the speed of trains to four miles an hour may be so manifestly unnecessary and unreasonable that a court may declare it void. Such was the case in Meyers v. Railroad Co., 57 Iowa, 555, 10 N. W. 896, 42 Am. Rep. 50, where the part of the city where the railroad ran was mere farm or agricultural lands inclosed with fences, and not laid out in streets.

The portion of the city in question here is different. It appears to be laid out in streets. Within a short distance of the crossing in question there appears to be a considerable and rapidly increasing city population, and the street making the crossing is a good deal traveled. Only two witnesses speak as to the amount of travel. One (for the plaintiff) says, "It is a well-traveled street." One (for the defendant) says, "There is lots of travel on Grace street; that is a well traveled street." While it may be true that a higher rate of speed through the portion of the city in question would be consistent with the public safety, we cannot say it is so clearly and manifestly the case that we can hold the passage of the ordinance an abuse of discretion on the part of the common council. If the ordinance be unreasonable, and unnecessarily oppressive to commerce, the best way to prove that and secure its modification is to obey it. Judgment affirmed.

V. Occupations and Amusements [8]

PEOPLE v. WAGNER.

(Supreme Court of Michigan, 1891. 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141.)

McGRATH, J. This case comes from the recorders' court of the city of Detroit by writ of certiorari, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record. Defendants are bakers, and are charged with making for sale, selling, and offering for sale, bread that was deficient in weight under the ordinance. The ordinance is entitled "An ordinance relative to the manufacture and selling of bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker, without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows:

"Sec. 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds (and no other) avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter: provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed, in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale: and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread.

"Sec. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stor-

[8] For discussion of principles, see Cooley, Mun. Corp. § 103.

ed, or deposited, or offered for sale, and to inspect and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weighing the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and, if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law.

"Sec. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this act, either by refusing him or delaying his entrance or admission into any of the places above named, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it, shall be impeded or obstructed.

"Sec. 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed fifty dollars and the cost of prosecution; and the offender may be imprisoned in the Detroit house of correction until the payment thereof: provided, always, that the term of imprisonment shall not exceed the period of six months."

The defendants insist (1) that matters contained within the body of the ordinance are not within its title; (2) that by the ordinance private property is taken wihout compensation; (3) that the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; (4) that it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; (5) that the ordinance is not within the police powers of the state.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the legislature do not apply to ordinances enacted by a common council of a city. People v. Hanrahan, 75 Mich. 611–615, 42 N. W. 1124, 4 L. R. A. 751.

The ordinance does not provide for the taking, seizing, or destruction of shortweight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk. In Wheeler v. Russell, 17 Mass. 258, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In Eaton v. Keegan, 114 Mass. 433, it was held that, in view of the statute requiring oats

and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, "Water." But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining the moisture. And again, it may be too cold; in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was 15 years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance.

Again, it is claimed that a barrel of flour will make 250 loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade. The state may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so

great that no other means will prove efficacious. Tied. Lim. § 89, p. 208.

Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves, if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one-third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. Tied. Lim. p. 208, § 89. The charter of the city of Detroit empowers the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot under the decision in People v. Armstrong, 73 Mich. 293, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, be subjected to the test of reasonableness. The convictions are affirmed, and the writ dismissed. The other justices concurred.

CITY OF DULUTH v. KRUPP.

(Supreme Court of Minnesota, 1891. 46 Minn. 435, 49 N. W. 235.)

MITCHELL, J.[9] The defendants were convicted of peddling without a license, contrary to the provisions of a city ordinance entitled "Ordinance No. 19. Peddlers, how Licensed," passed by the city

[9] Part of the opinion is omitted.

council in the assumed exercise of the power granted them by the city charter "to license and regulate all peddlers doing business within the city." Section 1 of the ordinance forbids peddling within the city without a license. Section 2 provides for the issuing of licenses, and fixes the amount of the fee at $100 for a year, $60 for six months, $15 for a month, and $5 for one day. Section 3 defines the term "peddling" as including all persons who go about the city selling, or offering to sell, personal property; but provides that it shall not include persons selling at wholesale to dealers, or to the acts of merchants or their employés in taking orders for goods, in stock at their places of business, at the houses of their customers. Section 4 prohibits any one, "whether licensed under this ordinance or not," from calling attention to their business or the wares which they have to sell by crying them out, blowing a horn, ringing a bell, or by any other loud or unusual noise. Section 5 fixes the penalty for the violation of the ordinance.

The defendants claim that the ordinance is invalid on three grounds, viz.: (1) That it was never legally passed; (2) that it embraces more than one subject, one of which is not expressed in the title; and (3) that it is not a legitimate exercise of the police power to regulate peddling, but a mere tax for revenue purposes, as demonstrated by the unreasonable amount of the license fee exacted, and the fact that its provisions in no way look to the regulation or control of the business. * * *

3. The license fee exacted is somewhat large, and the provisions of the ordinance looking to the regulation of the business of peddling are somewhat meager. But the fourth section certainly contains provisions tending to secure the orderly pursuit of the business; and the mere fact of exacting a license fee is one method of restricting it, which is itself a legitimate method of regulating some kinds of business. The latitude that is given to municipal bodies in fixing the amount of license fees, and the duty of courts not to declare the amount thus fixed unreasonable, except in very plain cases, have been fully considered by us in former cases. See City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; In re White, 43 Minn. 250, 45 N. W. 232. If this was a case of one of the ordinary legitimate kinds of business, like that of butcher, baker, auctioneer, or the like, which are not liable to become public nuisances, and consequently no occasion or right existed to restrict the number of persons who shall engage in it, it might be a question whether the fee exacted would not be unreasonable.

But the evils liable to grow out of some occupations may be such that their suppression can only be attained to an appreciable degree by the imposition of some restraint upon the pursuit of such callings or kinds of business. In respect to the great majority of occupations, no such evils are likely to follow; and consequently

it would not be competent to attempt to restrain the number of those engaging in them by the imposition of a large license fee. All that could be required would be an amount sufficient to pay the cost of issuing the license, and to defray the expense of necessary police supervision. But where the business is of such a nature that its prosecution will do damage to the public, or that it is liable to degenerate into a public nuisance, then it is a legitimate exercise of the police power to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in such business. Tied. Lim. 274 et seq. It is upon this principle that very high license fees are exacted from those vending intoxicating liquors. Peddling, although in itself a moral and lawful pursuit, is one of the kinds of business which, if not thus restrained, is very liable to become a great nuisance, especially in cities, as almost every one knows by actual experience; and in view of that fact it was a legitimate exercise of the police power vested in the city of Duluth to exact a license fee large enough to restrict the number of persons engaging in peddling, even although the sum was larger than enough to pay the cost of license and the expense of any police surveillance which the city might exercise over the business. In view of all the circumstances, we cannot say that the fee exacted is unreasonable.

4. It is further urged that the evidence did not justify the conviction; in other words, that the acts complained of did not constitute peddling. The evidence showed that the defendants were butchers who had a meat-shop in the city of Duluth; that they had a "delivery wagon," which they sent out in charge of an employé with meat to be delivered to fill orders previously given by their customers, but that at the same time they were accustomed to send out in the wagon other meat, also knives for cutting it, and scales for weighing it, and that the employé in charge of the wagon was accustomed to drive from place to place soliciting business, and selling to such as desired to buy from him, cutting up the meat, and weighing it out to the purchaser from the wagon. He solicited purchasers for the meat not only from the wagon, but by going from house to house when inmates did not see him and come out to the street. The defendants may not have belonged to the class of peddlers at which the ordinance was primarily aimed, but this mode of doing business constituted "peddling," not only within the definition given in the ordinance, but also according to the general and accepted definition of that term. The fact that the person in charge of the wagon may have, as he testified, only solicited those whom he calls "customers,"—that is, persons who had been accustomed to buy from him,—did not make it any the less "peddling." City of Chicago v. Bartee, 100 Ill. 61; Graffty v. Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

The exclusion of the evidence complained of in the sixth assignment of error was at most error without prejudice, as the whole matter sought to be inquired of was afterwards fully gone into without objection. We find no error in the record, and the result is that the order appealed from must be affirmed.

STREETS, SEWERS, PARKS, AND PUBLIC BUILDINGS

I. Use of Streets [1]

TOWNSEND v. EPSTEIN.

(Court of Appeals of Maryland, 1901. 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441.)

Suit by Townsend, Grace & Co. against Jacob Epstein. From a decree in favor of defendant, plaintiffs appeal.

JONES, J.[2] This case presents questions of more than usual interest and importance, but we think principles enunciated in comparatively recent decisions of this court must so far control its decisions as to render the solution of these questions free from difficulty. The facts giving rise to this litigation are as follows:

The appellants (who were plaintiffs below) are the owners in fee of a lot of ground fronting about 49 feet on the south side of Fayette street, in the city of Baltimore, and running southerly, with uneven width, back to and abutting about 68 feet on a small street known as "Garrett Street," which runs east and west parallel with Fayette street to the north of it, and with Baltimore street to the south of it. This lot is occupied by a large building extending from street to street, which is used by the appellants as a factory for the manufacture of straw goods. In this building, looking out upon Garrett street, are a number of windows for the admission of light to the different floors thereof. The appellee is the lessee and occupant of three parcels of ground with the buildings thereon fronting on the north side of Baltimore street, and extending northerly to Garrett street, and is conducting upon these premises a large merchandising business. For the purposes of this business he has recently purchased a lot of ground lying between and abutting on Fayette and Garrett streets, fronting on the south side of the former, and extending back to the north side of the latter street, and situated immediately opposite to where his premises lying between Baltimore and Garrett streets abut on the latter street, and to the west of the premises of the appellants. Upon this lot he proposes to erect a six-story warehouse, and to establish communication between that and the premises and buildings occupied by him on Baltimore street by a tunnel under and a structure above and across Garrett street. The tunnel has been constructed. The structure across Garrett street has also been nearly completed. This is an inclosed structure, about 33 feet to the west of the premises of the ap-

[1] For discussion of principles, see Cooley, Mun. Corp. § 109.

[2] Part of the opinion is omitted.

pellants, and is about 17 feet above the surface of the street. It is now connected with the building of the appellee which fronts on Baltimore street and extends back to the south side of Garrett street; is 30 feet in width, running with the latter street; and is built 3½ stories high across it to where this structure is intended to be connected on its north side with the warehouse which the appellee proposes to there erect.

Before proceeding to construct this tunnel or to erect this connecting structure, the appellee applied for and procured from the mayor and city council of Baltimore, after complying with all formal requirements, the passage of an ordinance purporting to grant to him the privilege and right, under regulations therein prescribed, to construct such tunnel under Garrett street, and to erect an inclosed superstructure across said street to "connect one or more floors of the premises of Jacob Epstein on West Baltimore street * * * with the corresponding floor or floors of the building or improvements to be erected by him on the south side of West Fayette street and the north side of West Garrett street." This ordinance recited that this right was granted "for the convenience of the public having business with Jacob Epstein."

The appellants began this suit by filing a bill in equity charging, in substance, that this ordinance, in attempting to grant to the appellee the right to build a tunnel under and a structure over Garrett street, as therein provided, is invalid and void, and that the attempt made by the appellee to exercise such right is an invasion of their rights as abutting lot owners on said street. They pray that the said ordinance shall be declared invalid and inoperative, and that the appellee be perpetually enjoined from digging the tunnel and from erecting the superstructure as proposed, and that he be required to restore the earth removed from the tunnel, and to take down and remove such part of said superstructure as had already been erected. The trial court refused the relief prayed for by the appellants, and decreed that their bill be dismissed.

Garrett street is a public street of the city of Baltimore, and as such subject to the same control of the municipality as it has over all of its streets and highways. The rights of the parties to this controversy are, therefore, to be determined from their relation to this street as a public street or highway of the city. * * * It would seem, therefore, that the appellants, as against the appellee, can claim no greater rights in or over this street than such as belong to both parties as abutting owners upon this highway. The question, therefore, is, do these rights entitle the appellants to the relief prayed for in their bill against the acts of the appellee in respect to the street in question which are therein complained of? * * *

That owners of lots or ground abutting upon the public streets have rights in the easement which are valuable, and are in addition to those

which they have in common with the general public, is recognized in our statute law, which confers upon the city of Baltimore the power for laying out and closing up streets by providing for compensation to such owners upon the closing of an adjacent street (Acts 1898, c. 123, § 6, subtit. "Streets, Bridges and Highways"), the same provision being formerly contained in Code, art. 4, § 806, Pub. Loc. Laws. Such right of the abutting owner thus recognized was enforced by this court in the case of Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, where it was said: "It is recognized by the statute that abutting owners have interests in the street or alley which are valuable, and that these cannot be taken for the public use without compensation. It is believed that no one will contend that they can be taken for private use on any terms whatsoever. Certainly such a doctrine has never at any time found any toleration in this state." In the case just referred to, relief was sought against the obstruction of the public alley there in question, so as to cut off the complaining lot holders from ingress and egress from and to another public street, and to destroy the right of passage out and over said alley to this street. * * *

Now, this valuable property right in the public street which this court upheld in the case just referred to embraces something more than the mere right of passage over the surface of the street, which was the right more directly involved in that case. The abutting lot holder has the right to the enjoyment of the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy, the comfort, enjoyment, or use to be derived from the easement to which he is entitled; and we find this recognized by very high authority. In 2 Dill. Mun. Corp. (4th Ed.) § 712, it is said: "There is a large class of cases in which no recovery can be had for mere consequential injuries to adjacent property from the construction of public improvements in the streets, towns, and cities; the lot owner holding subject to the right of the public to use the streets for any purpose consistent with the legitimate uses for which they were dedicated or acquired. But lot owners have a peculiar interest in the adjacent street, viz. easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves; and they may recover from the company making such improvements such damages as they may sustain by injuries to or invasions of such easements." Again, in the case of Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406–409, 41 Am. St. Rep. 311, the court said: "It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. * * * The dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the

surface of the soil." The case just cited is peculiarly apt here, because it deals with facts and conditions very similar to those presented by the case at bar. * * *

It is thus seen that the right of the abutting owner to light and air from a public highway as part and parcel of the easement is distinctly recognized in the authorities when such right has been drawn in question, and it rests upon sound and obvious reason. Recognition of this right is not at all at variance with the decisions of this and other courts of this country in regard to the doctrine of ancient lights, which hold that such doctrine is unsuited to conditions here. The case of Cherry v. Stein, 11 Md. 1, cited and relied upon by the counsel for the appellee, is an illustration of these cases. The doctrine of ancient lights, that they repudiate, involves an abridgment of the use which an owner can make of his own property. It puts upon the property of one a servitude in favor of another. This is not the nature of the right to light and air from a highway, which belongs to an abutting owner as part of the easement. This right to light and air is the distinct right of every abutting owner; and in claiming protection for it such owner is not imposing a servitude upon his neighbor's property for his benefit, but is only asserting his equal right with his neighbor to the enjoyment of an easement common to them both. * * *

We have seen, now, the nature and extent of the rights of the appellants in and to the street of the obstruction of which they complain. If the public easement has been improperly and unlawfully obstructed by the appellee, then he has been guilty of creating a nuisance; and, if the appellants have suffered therefrom an injury different in kind from and beyond that suffered by the community generally, or special and particular damage resulting to them by reason of the nuisance, then they have a right to their private remedy for such injury. Garitee v. Mayor, etc., 53 Md. 422; Field v. Barling, supra. To discover what injury, if any, the appellants have suffered from the acts of the appellee, and the character of the injury, resort must be had to the proof. This does not show that the appellants have suffered or are suffering any injury from the tunnel constructed under the bed of the street in question as has been described. In reference to the superstructure, the proof shows that it tends to and does diminish and obstruct the light from the street to the premises of the appellants. * * *

It appears, therefore, that the appellants have suffered injury from the erection of the superstructure complained of. It further appears that this injury is one different in kind and degree from, and in addition to, such injury as the general public suffer by reason of the obstruction. This results from the situation of the premises of the appellants with respect to the obstruction, and the nature of the use of these premises, and the construction of the part thereof abutting on Garrett street. The proof shows that in the part thus abutting there

are many windows, as to some of which, in the lower floors of the building, there is an entire dependence for light upon Garrett street. The premises are used for manufacturing purposes, for which a proper supply of light is more of a necessity than a mere matter of comfort or convenience. It is further shown that, owing to the diminution of light resulting from the obstruction in question, the appellants have been compelled to resort to an increased supply of artificial light for the purposes of their business. These considerations would seem to make a distinct difference between the injury to the appellants caused by the obstruction of which they complain as a nuisance and that suffered by the general public.

It is contended on behalf of the appellee, however, that, though there may result injury and inconvenience to the appellants from the erection and maintenance of the structure in question, the appellants have no cause of action, and are without remedy, because the structure is a lawful one, in that it was authorized by the ordinance of the mayor and city council, which has already been referred to. The corporation, the mayor and city council of Baltimore, is invested with the title to and control over the public streets. This control, however, is not an arbitrary control. The streets and highways are held in trust for the benefit, use, and convenience of the general public. There are many ways in which the power to control and regulate the use of the streets can be and must be exerted by the municipality to meet the necessities and the convenience of an urban population, but the exertion of this power must have for its object a public purpose. It is not in accord with the trust upon which the municipality holds the streets, nor with the nature of the control which it has over them, to make use of the power and authority with which it is invested in that regard to promote a mere private purpose, to subserve a mere private interest, or to subordinate the right of one citizen in the streets or in a street of the city to the private interest and convenience of any other. In the case of Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, supra, this court held that this could not be done even if compensation were made, and though done under the guise of serving a public purpose. A fortiori, it cannot be done without compensation.

We are confronted here with the same inquiry that the court was called upon to make in the case last cited: Was the ordinance under which the appellee here undertakes to justify the acts complained of passed to subserve a public purpose, or does it serve a mere private purpose and private and individual interests? Upon the face of it, it seems to recognize the limitations upon the right and power of the municipality to pass ordinances of this nature by expressing its object to be "for the convenience of the public having business with Jacob Epstein." This is a rather thin disguise. It is but another form of saying "to promote the private business of Jacob Epstein and his convenience in respect thereto." How does it serve the general pub-

lic, or a public purpose, to facilitate Jacob Epstein, at the expense of his neighbors, in attracting customers to, and serving them at, his store? Aside from this, the proof makes it perfectly clear that only private interests are to be subserved by the privileges obtained under the ordinance in question. The appellee, in his testimony, says "that he intends to use this superstructure, after his Fayette street building is completed, as a means of egress and ingress from the Baltimore street premises to his Fayette street premises, for his customers and his help on the floor"; "that, if anybody wants to go through there, to use it as a way to go between Baltimore and Fayette streets, he would not object, but that he does not intend it for a public thoroughfare." This only condenses what sufficiently appears otherwise, and evidences the absolutely private purpose for which the structure is to exist, and the private control that it is to be under.

If the municipality can grant a privilege of the character of the one here in controversy, it implies a power to practically destroy a street as an open, light, and comfortable highway, and its use for the purposes of residence or business by the abutting owners in total disregard of the rights of such owners. If the privilege be granted to one, it cannot be denied to others who may apply for it in like circumstances; and the grant of such privilege might go to the extent of practically transforming any part of a street from an open highway affording unobstructed passage, light, and air into a covered and darkened way. The exercise of such a power as was attempted in the ordinance to which reference has been had cannot receive the sanction of this court. The ordinance, for the reasons assigned, is an invalid act, and affords to the appellee no bar to the legal redress to which the appellants are entitled for the injury caused to them by the acts of which they here complain. * * * Reversed.

CITY OF ST. PAUL v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, 1896. 63 Minn. 330, 65 N. W. 649, 31 L. R. A. 184.)

On rehearing.

MITCHELL, J.[3] This appeal has once before been considered by this court. 63 Minn. 330, 63 N. W. 267. * * *

The land in question fronts on the Mississippi river, and was dedicated by the original proprietor to public use as a "levee." Defendant's grantor, being in possession of the premises and claiming adversely to the city, had erected thereon a wooden freight house, fronting on the river, and some 400 or 450 feet long. In 1881, after defendant took possession, it presented a petition to the common council of the city of St. Paul, stating that it contemplated

[3] Part of the opinion is omitted.

taking down this freight house, and replacing it with a large and permanent one, and asking permission in the meantime to erect a temporary wooden structure. This permit was granted, the limit of the permit being two years.

In March, 1882, the defendant presented a further petition to the common council, stating that it was then ready to construct its new freight house, which was described as to be a large, elegant, and permanent structure, plans of which were submitted. The petition further stated that, in order to carry out the plan of the structure as demanded by the growing commerce of the city, it would be necessary to extend the river front of the building out into the river from seven to ten feet further than the front of the old one; and requested the council to approve the plan of the proposed building, and to grant permission to extend it out into the river to the limit above mentioned. The plan proposed was of a building about 600 feet long and 50 feet wide, of brick, with stone foundation and a slate roof. In response to this petition the council, in April, 1882, by a unanimous vote, passed the ordinance in question (No. 286), which is as follows:

"Section 1. That permission be, and the same is hereby given to the Chicago, Milwaukee & St. Paul Railway Company to take down and remove the old freight-house, which is owned and used by said company, standing next below Sibley street on the levee, and to erect a new freight building upon the site now occupied by said old freight-house, provided that the new structure may be extended a distance of ten feet nearer the Mississippi river than the old one, if the city engineer shall be of the opinion that the same shall in no manner interfere with the navigation of said river. And provided further, that said new freight-house shall be built substantially in accordance with the plans on file in the office of the city clerk. And provided that the basement or lower story fronting on the river shall be laid with substantial floor, and said lower story, together with the platform on the river front, and the railway track along the said river front shall be open and subject to the use of the public for all wharfage and transfer purposes without charge, and a sufficient platform and entrance for drays shall be provided for said lower story at the end of said building.

"Sec. 2. Nothing in this ordinance contained shall be construed as waiving any of the rights of the city of St. Paul in and to the real property proposed to be occupied by said building. * * *"

Thereupon the defendant proceeded and erected, and has ever since maintained, the freight house, in accordance with the provisions of the ordinance.

It may be here suggested that the authority of defendant's grantor, the St. Paul, Minneapolis & Manitoba Ry. Co., under its charter (Laws 1857, Ex. Sess., c. 1), "to construct its railroad upon and

along, across or over any public or private highway," etc., "if the same shall be necessary," does not extend to or contemplate the construction upon a highway, of stations, depots, freight houses, or other buildings, but applies only to railroad tracks, where the use of the highway by the railroad company will be concurrent with that of the general public, and not exclusive. Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438, 52 N. W. 913. It is elementary law that a municipal corporation has no proprietary rights in the streets, levees, or other public grounds within its limits. Whatever rights it has it holds merely in trust for the public. It is equally elementary that all its powers over such public grounds are derived from the legislature. It can exercise no power over them, except such as is given it by the legislature, either expressly or by necessary implication. It is also well settled that a grant of power to a city to grant any privileges or rights in streets or other public grounds is to be strictly construed, and not enlarged by construction; and, if there is a fair or reasonable doubt as to the existence of its power, it will be resolved against the municipality. Dill. Mun. Corp. § 705; City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

With these general principles in mind, we come to the consideration of the provisions of the charter of the city of St. Paul relating to the powers of the city council over public grounds within its limits, and which were in force in 1882, when Ordinance No. 286 was passed. The charter then in force was Sp. Laws 1874, c. 1, and amendments. Subchapter 4, § 7, of that act, provided that "the common council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and grounds, and parks and sewers, and all other public improvements and public property within the limits of said city." The able counsel for the defendant seems to rely with confidence on this as giving authority to the common council to pass the ordinance in question. He says: "Statutory provisions of this kind have uniformly been held to confer upon city councils authority to grant the railway companies the right to occupy public streets; at least, as against the city and the public."

We have examined all the authorities cited by counsel, and submit, with all deference to him, that none of them support his contention. Some of these cases merely hold that a certain use of a street, as by erecting telephone poles and wires, or constructing a horse railroad, is a proper "street use," and imposes no additional servitude on the street; while others are merely to the effect that, under a general grant of power to regulate the use of streets, the city council has the power to prescribe the manner in which, or the conditions upon which, streets may be occupied for a legitimate "street use." In Gregsten v. City of Chicago, 145 Ill. 451, 34 N. E. 420, 36 Am St. Rep. 496, the city had an express grant of authority to do what

it did. In St. Louis v. W. U. Tel. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, the only thing decided was that the city was authorized by the constitution and laws of Missouri to impose upon a telegraph company putting its poles in the streets of the city a charge in the nature of rental for the use of the streets for that purpose. Neither party was in position to question the authority of the city to permit the company to place its poles in the streets, for it was by virtue of the exercise of this power that the city claimed the right to make the charge, and the permit granted by the city in the exercise of this assumed power constituted the only right on the part of the company to put its poles in the street.

We are of the opinion that the "care, supervision, and control" of streets and public grounds, and the power to regulate their use, which is the usual and ordinary grant of power to municipal corporations, and which is certainly as broad as the power granted by the section above quoted, is not sufficient to empower them to authorize the use of such grounds for the purpose even of constructing and operating thereon a commercial railway, much less of erecting thereon depots, freight houses, or other buildings which exclude the general public from the concurrent use of a part of the street or other public ground. Dill. Mun. Corp. § 705, and cases cited; Lackland v. Railway Co., 31 Mo. 180. In this state these would not be proper "street uses," but the imposition of an additional servitude upon the street. Section 8 of the same subchapter of the city charter gives the common council power to vacate and discontinue public grounds, etc., upon certain conditions, but it will not be claimed that this section has any application to the case in hand.

The only other provision relating to the power of the common council in the premises is section 11 of the same subchapter, which reads as follows: "The common council shall have power and authority by a vote of three fourths of all the members elect of said council to grant the right of way upon, over and through any of the public streets, highways, alleys, public grounds or levees of said city to any steam railway or horse railway company or corporation upon such limitations or conditions as they may prescribe by ordinance." We may consider this in connection with Gen. St. 1878, c. 34, § 47 (Gen. St. 1894, § 2642), cited by counsel for defendant, and which reads as follows: "If it became necessary in the location of any part of a railroad to occupy any road, street, alley or public way or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals."

Section 11 of the chapter quoted above clearly refers only to "trackage"; that is, to the right to construct and operate railroad tracks on the streets or other public grounds. This is conclusively shown by the term "right of way." It does not give the common council any authority to barter away, or transfer to a railroad company, the right to use any part of the streets or public grounds as a site for depots or freight houses, to the entire exclusion of the public therefrom. This seems to us too plain to require argument. It also seems to us that the provision of the General Statutes cited is subject to the same limitation. The phrase, "in the location of any part of a railroad," clearly indicates to our minds that this also refers only to "trackage," and that it is but the counterpart and equivalent of section 11 of the city charter. It was never intended to authorize municipal authorities to sell or give away to railroad companies, as sites for depots and other buildings, lands in which they had no proprietary interest, and which they held merely as trustees for the public. Any such power would be an exceedingly dangerous one to vest in municipal authorities, and it would require very clear language to that effect to warrant a court in holding that the legislature intended to grant them any such power. Whether the authority of railway corporations to acquire rights in streets and other public lands by the exercise of the right of eminent domain is limited to "trackage" or "right of way," it is not necessary now to consider. If there is any other provision of statute containing any grant of power to the common council of St. Paul over public grounds within its limits, our attention has not been called to it by counsel, neither have we found it. Nowhere do we find any grant of power authorizing the common council to give the defendant the right to use and occupy any part of the public levee as a site for its freight house. It follows that this ordinance is invalid because not within the granted powers of the common council.

We have not overlooked the difference between a "street" and a "levee." A street is designed exclusively for the purposes of travel and intercommunication. The word "levee," as used in the West and South, means a landing place for vessels, and for the delivery of merchandise to and from such vessels, and, as incident to that, for the temporary storage of the merchandise. Hence, some things might be a proper use of a public levee which would constitute a misuser of a street. For example, the erection and maintenance of a warehouse as a place for the receipt and delivery and temporary storage of goods while in transit would probably be a proper use of a levee, provided it was open to the common use of all on the same terms. This would be in aid of and necessary to the main object for which a levee is designed. But this is a very different thing from giving to a particular person or corporation the right to occupy a levee as a site for its warehouse solely for its own business, and to the exclusion of the general public, as was attempted by the ordi-

nance in question. The fact that the common council stipulated that a small part of the structure might be used by the public for wharfage and transfer purposes does not alter the case.

It can hardly be necessary to say that the fact that the defendant may have expended its money on the faith of this ordinance creates no equitable estoppel against the public, whose mere trustee the city is in prosecuting this suit. The defendant was bound to take notice of the extent of the powers of the common council from which it obtained the ordinance. The result is that the former decision is adhered to, although, as to the point now considered, upon a different ground.

CITY COUNCIL OF AUGUSTA v. BURUM.

(Supreme Court of Georgia, 1893. 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.)

Petition by P. & G. Burum & Co. and others to restrain the city council of Augusta from the execution of a resolution providing for the removal of awnings and hanging signs. An injunction was granted, and defendant brings error.

LUMPKIN, J.[4] 1. By a special act approved November 23, 1814 (Acts 1814, p. 36; City Code Augusta, p. 346), "to prevent encroachments on the streets and highways in the city of Augusta, and to remove such as now exist," the municipal authorities of that city were given full power to remove any "obstruction or encroachment upon the streets or highways, within the limits of said city, at the expense of such person or persons as shall cause the same." The method of exercising the power thus conferred is pointed out in section 6 of that act, which declares "that the said city council of Augusta shall have full power and authority to make such by-laws, rules and regulations, as they may deem necessary, fully and effectually to prevent encroachments on the said streets and highways hereafter, and to remove such as now exist, and such as may hereafter exist, as in their opinion may be least burthensome to the citizens, and best calculated to promote the good order and welfare of said city and its inhabitants." Undoubtedly, in the exercise of the powers incident to this grant of control over the streets of the city, the municipal government could, by ordinance, peremptorily prohibit the erection of any awning, of whatever material or however constructed, which encroached ever so little upon a street or sidewalk; and, as to an awning built in violation of such ordinance, the city authorities could cause the same to be summarily torn down, with or without notice to the owner.

The record, however, discloses that awnings have existed in Augusta from a time "when the memory of man runneth not to the con-

[4] Part of the opinion is omitted.

trary," and that no official action was taken by council in respect to such structures until 1857, about 43 years after the passage of the act of 1814. Prior to 1857, the municipal authorities seem to have acquiesced in the erection of such awnings as property holders might deem proper, convenient, and safe. Certain it is that no ordinance having direct reference to awnings was adopted until the year last named, when it was ordained that "all posts and rails fixed in any street for the purpose of supporting any awning shall be round, turned posts, and shall be placed next to and along the inside of the curb-stone, and shall be twelve feet in height above the sidewalks, including the rail on top;" and "no portion or any part of any cloth or canvas used as an awning shall hang loosely down from the same over the sidewalk or foot-path." Again, in 1888, after the lapse of about 31 more years, another ordinance was adopted, in which it was declared that "all consents or permissions heretofore granted by the city council, or by the board of fire wardens," in respect to the erection of awnings, be revoked; and "no person or persons shall build or erect any hanging sign or signs, awning or awnings, on the streets of this city without first obtaining permission from the streets and drains committee of council and the board of fire wardens conjointly, which permission may be revoked at the pleasure of council." Notwithstanding this last ordinance, it does not appear that any action looking to the removal of existing awnings was taken by the city authorities until the 28th of February, 1893, when council adopted a resolution in these words: "Resolved, that all wooden awnings in the city, i. e. over streets or sidewalks, be taken down within sixty days, at the expense of the owners." The petition in the present case was brought to restrain the municipal authorities from executing this resolution, which is in the nature of an ordinance. The injunction prayed for was granted, and the city council excepted.

Petitioners, among other things, alleged that the awnings in question were erected, at considerable expense, with the full knowledge and consent of the city authorities; "that the last erected awning of petitioners was put up more than nine years ago, and most of them have been where they now are for more than twenty years, except that when new material was inserted therein to strengthen an old awning or rebuild;" that these awnings are in good order and repair, and are of such kind as have customarily been constructed, and allowed by the city to exist, time out of mind, and that they offer no obstruction to the full and free enjoyment of the streets and sidewalks. The contention of petitioners, therefore, is that it would be inequitable, unjust, and oppressive for council now to be allowed to capriciously revoke the license conferred, and, irrespective of any necessity for so doing, to summarily destroy their property, without compensation, and without even notice to them, or an opportunity to be heard upon the question of removing their awnings. The defendant, though not conceding that the awnings of petitioners were

erected, or have been allowed to remain, under its express permission, replies that, even if licenses were granted, they could be revoked at pleasure, and that, in the exercise of the police powers with which the municipal authorities are vested, the awnings could be removed summarily without notice to the owners. It is quite certain from the record that if the awnings involved in this controversy have any rightful existence, it can be accounted for only on the assumption that they were erected under license, either express or implied, from the city government, and, no matter how long they have existed, their continuance must be referred to the original license, or to a renewal or repetition of the same. The question, therefore, is: Can the doctrine of estoppel, under these circumstances, be invoked to prevent the city authorities from removing encroachments which, undoubtedly, as an original question, they had full power to prevent? or, in other words, is the license to erect and maintain these awnings perpetual and irrevocable?

In answer to this question, we will, in the first place, remark that no express legislative authority has ever been conferred upon the city government to grant the right to erect and perpetually maintain awnings over the sidewalks of the city, and, this being so, that such authority has never existed. The municipal government of Augusta, irrespective of the special act of 1814, has, we presume, as the authorities of most cities have, the power to regulate and control the streets and sidewalks. Beyond question, the city council of Augusta, has, by virtue of that special act, an express and clear legislative right to remove obstructions and encroachments on the streets. This right was wisely conferred for the benefit of the public, to whom the streets and sidewalks really belong, and the city council cannot, in the absence of clear and unequivocal authority from the legislature, perpetually deprive itself of this right by ordinance, contract, or otherwise. Public policy forbids that a city government should be allowed to part with any of its powers the exercise of which may be necessary to secure and conserve the public welfare; and any violation of this policy necessarily tends to an impairment of the usefulness and efficiency of the city government, and consequently to defeat, in a greater or a less degree, the very purposes for which it was created. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing amounting, in effect, to the alienation of a substantial right of the public. In a case like that of Laing v. City of Americus, 86 Ga. 756, 13 S. E. 107, the applicability of the doctrine here announced is clear enough, because there the obstruction placed upon the sidewalk was, without doubt, a nuisance per se; but, for the purposes of the present case, it makes no difference whether an awning is a nuisance per se or not. In Hawkins v. Sanders, 45 Mich. 491, 8 N. W. 98, it was held that a wooden awning over a sidewalk, in front of a store, was not.

There can, however, be no doubt that an awning of any kind, extending over a sidewalk, and supported by posts, is an encroachment, and to some extent, at least, an obstruction; and it has been shown, we think, that the municipal government of Augusta has never had any authority to grant permission to any of its citizens to erect and maintain in perpetuity any such encroachment or obstruction in that city. It is equally true, we think, that no lapse of time could render valid, so as to become irrevocable, a license which the city never had the power to grant in perpetuity. Although, in Tennessee v. Virgin, 36 Ga. 388, this court held that as to actions against a citizen the latter could, under the act of 1856 (Code, § 2925a), plead the statute of limitations, and that in Georgia the maxim of "nullum tempus occurrit regi" had been abrogated, we are quite certain that no statute of limitations or prescription of any kind could so operate as to abridge in any manner the exercise of the legitimate legislative powers of the state conferred by the people for the common welfare of all. In this sense, at least, the kindred maxim "nullum tempus occurrit reipublicae" is still of force, and it is applicable to a city council, so far as its legislative powers conferred upon it by statute are concerned, as well as to the state itself, the city government being, in this respect, a part of the lawmaking power of the commonwealth. In this country the people are the rulers,—the source of all power,—and it cannot be sound doctrine that their servants in any lawmaking department can, by the lapse of time, any more than by their own action, be deprived of powers the exercise of which are essential or necessary to the proper performance of their duties and obligations to the public.

2. Having shown that licenses granted by the city council of Augusta to erect awnings, whether such licenses were express or implied, could not for any reason be irrevocable, we will now state and briefly discuss another principle applicable to the facts of the present case. We think that where citizens of Augusta, with the permission of the city authorities, erected awnings, which, of course, involved expense, there would be an equitable estoppel against a needless or capricious revocation of the permission until after the lapse of sufficient time to allow the parties incurring the expense to realize, in the use and enjoyment of their awnings, a fair return for their outlay. Whatever may be the law in other jurisdictions, it is now well settled in Georgia that, as between private persons, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. This doctrine was announced as far back as 3 Ga. 82, in Sheffield v. Collier, and again in Mayor, etc., v. Franklin, 12 Ga. 239, in which Judge Nisbet said: "The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agree-

ment for a valuable consideration, and he a purchaser for value." Pages 242, 243. See, also, Winham v. McGuire, 51 Ga. 578, and Railroad Co. v. Mitchell, 69 Ga. 114. * * *

The spirit of the principle thus announced is, within the limits indicated, applicable to the case before us. The city council could subserve no interest of the public by allowing awnings to be erected, and then, immediately, without reason, and in mere caprice or wantonness,—if such a thing be conceivable,—requiring them to be removed. Such a course would be harsh and unjust, without excuse, and unnecessary. This would be true even under the ordinance of 1888, in which the city council expressly reserved the right to revoke at pleasure any permission which might be given for the erection of awnings. This reservation would not confer upon the city authorities any right by granting a citizen permission to erect an awning, to mislead him into the belief that he would be allowed to enjoy it for at least a reasonable time, and then wantonly force him to destroy a structure, to erect which he had, on the faith of this belief, incurred expense. It is also established and sound law, however, that a verbal license, even when fully executed, is not necessarily forever irrevocable. In Wingard v. Tift, 24 Ga. 179, it was held that a verbal license to erect a dam and fish traps was not a license to renew the same after they had been washed away by high water. * * *

Following this doctrine, and remembering, for the reasons already given, that the city authorities are not to be held as strictly to the terms of licenses granted by them as private persons would be, we are satisfied that persons who have been allowed to reap substantially the benefits of the money they have expended in putting up awnings can have no cause of complaint that the city thereafter revokes the permission given to erect them. After they have enjoyed this benefit, we see no reason why, under the broad powers conferred by the act of 1814, the city government, in pursuit of a policy to have all awnings in the city constructed of such materials and in such style as is deemed proper and suitable under existing conditions, having reference to the convenience of the public, the sightliness of the streets, and other proper and reasonable considerations, may not cause to be removed old awnings, which had already been permitted to stand for many years. When the time has arrived when the city may fairly and in good faith revoke existing licenses to maintain these structures, the municipal authorities may have them removed as encroachments upon the streets, no longer authorized; and if the owners, after reasonable and fair notice, fail or refuse to remove them, the city may have them removed at their expense. * * * Reversed.

II. Abutting Owners [5]

ZIMMERMAN v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals, Missouri, 1911. 154 Mo. App. 296, 134 S. W. 40.)

Action by A. D. Zimmerman against the Metropolitan Street Railway Company. Judgment for plaintiff. Defendant appeals.

ELLISON, J.[6] In the month of October, 1903, defendant was operating a street car line east and west on Fifteenth street in Kansas City at a point where that street intersects Kensington avenue. On the east side of Kensington avenue and south side of Fifteenth street was a car barn of defendant, used for the purpose of storing cars, and for such other purposes as are incident to a switchyard of a street railway company. On the west side of Kensington avenue, and immediately south of Fifteenth street, plaintiff had the ownership and possession of a tract of land abutting upon Kensington avenue at said point 132 feet, and situate upon this abutting property are two two-story buildings, to which buildings ingress and egress is had by way of Kensington avenue.

The petition alleges that the defendant had no legal right whatever to construct any street car tracks or any other obstructions in Kensington avenue along and in front of the plaintiff's property; that in the month aforesaid the defendant began the construction of a switch track from the Fifteenth street tracks at a point slightly west of the west line of Kensington avenue, and built such track in a southeasterly direction across Kensington avenue at a point a little south of the south line of Fifteenth street, which track, as so constructed, entered into the barn of defendant. After the switch track had been laid down, defendant began the construction of a spur track in Kensington avenue, branching off in a southerly direction from the south side of the switch track, and then plaintiff filed his petition in the circuit court asking to enjoin defendant from further constructing "car tracks in said Kensington avenue, and from the obstruction and destruction of said Kensington avenue as a public highway; that defendant be ordered to remove all tracks and other obstructions placed in said Kensington avenue, and to restore said Kensington avenue to the condition in which it was previous to the acts herein complained of." * * *

After filing the petition defendant ceased to further dig in Kensington avenue or further construct tracks there until December 4, 1903, on which date there was approved by the mayor of Kansas City an

[5] For discussion of principles, see Cooley, Mun. Corp. § 110.

[6] Part of the opinion is omitted.

ordinance styled "An ordinance granting permit to the Metropolitan Street Railway Company to lay and maintain a spur track on Kensington avenue south of Fifteenth street," which permit recites that the company owned 190 feet fronting on the east side, and that the track is permitted to be constructed along in front of said 190 feet on Kensington avenue, with turnouts to the car barn of said Metropolitan Street Railway Company.

Between the date of granting of said permit, and the trial of the cause, the spur tracks in Kensington avenue were actually constructed by defendant as plaintiff alleged in his petition would be done. Defendant was shown by the evidence to be using the street as a depot yard for the purpose of shunting cars, and cleaning them and storing them, as plaintiff in his petition alleged would be done. On the showing of these facts, the trial court issued an injunction in words as follows: "It is ordered, adjudged and decreed that defendant be permanently enjoined from storing or washing cars on any part of Kensington avenue, between Fifteenth and Sixteenth streets, in Kansas City, Missouri, and that they be permanently enjoined from standing cars on said parts of said Kensington avenue. * * *

The evidence does not show that plaintiff acquiesced in these acts of defendant. The evidence showed that for all practical purposes the defendant took possession of that part of Kensington avenue whereon plaintiff's property abuts. By the construction of tracks leading from its main tracks on Fifteenth street, over Kensington avenue into its car barn, it well nigh destroyed the safe ingress and egress to plaintiff's property by himself or by those connected with him socially and in a business way. It is not meant to say that defendant so obstructed the way that plaintiff could not possibly get to and from his property, or that others could not do so. They could have gotten to the property by necessary effort, if defendant had inclosed it with a wall, or had surrounded it with a stream of water. But a property owner is entitled to a safer and more convenient use of an abutting street than that. He is entitled to have it not materially obstructed. "An abutting property owner has the same right to use of the street that the public has; in addition thereto, he has rights which are special to himself, and the right of ingress and egress, and this right is a property right, which he may protect." Schopp v. City of St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; Lackland v. Railway, 31 Mo. 180; Lockwood v. Wabash Ry., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; De Geofroy v. Merchants' Bridge & Ter. Ry. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; Realty Co. v. Deere & Co., 208 Mo. 66, 106 S. W. 496, 14 L. R. A. (N. S.) 822. "An obstruction in a street or highway may be both a public and a private nuisance, and, in such cases, the private citizen who is especially injured may have injunctive relief." Schopp v. St. Louis, supra; Cummings v. St. Louis, 90 Mo. 259, 2 S. W. 130.

We have considered the matter of the permit granted by the city to construct the tracks in controversy. A municipal permit to put structures in or on the streets, cannot be allowed to destroy the use of abutting property by its owner. A municipality cannot legally authorize the creation or maintenance of a nuisance. It cannot authorize the construction and operation of a railway which will necessarily destroy it as a public way and deprive abutting owners of access to their property; and the use may be restrained by injunction. Lockwood v. Railway, supra; Dubach v. Railroad, 89 Mo. 483, 1 S. W. 86; Belcher v. Elevator Co., 82 Mo. 121; Schopp v. St. Louis, supra; Sherlock v. K. C. Belt Ry. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

A street railway company cannot be legally authorized to establish structures in the streets for the convenience of the road, which materially affect an abutting property owner's use of his property. If such company must have such structures, it must procure ground not owned by the public for the use of the inhabitants generally. Lackland v. North Mo. Ry. Co., 31 Mo. 180, 186.

We think no estoppel against plaintiff was shown. The judgment was for the right party, and is affirmed.

STATE (IVINS et al., Prosecutors) v. CITY OF TRENTON.

(Supreme Court of New Jersey, 1902. 68 N. J. Law, 501, 53 Atl. 202.)

Certiorari to review a city ordinance by Minor H. Ivins and others, as prosecutors, against the inhabitants of the city of Trenton.

HENDRICKSON, J.[1] The prosecutors seek to set aside, as invalid, an ordinance of the city of Trenton approved March 18, 1902. The ordinance ordains that the erection, etc., of any stationary or swinging sign, or any stationary awning, shed, or other obstruction, across the whole or any portion of any sidewalk within that portion of the city of Trenton embraced within certain bounds defined in the ordinance, shall be deemed and is thereby declared to be a nuisance. It contains provisions empowering and directing the police department to prevent such erections or other obstructions across the whole or any portion of any sidewalk within said bounds, and to remove any such erection or obstruction there existing in front of any building where the owner or occupant neglects or refuses to remove the same after 10 days' notice in writing. A penalty of $20 is also added in case of such neglect or refusal after notice. The prosecutors are the owners of a brick store building and lot known as No. 120 North Broad street, in said city, where for several years they have conducted the business of dealers in fruits, vegetables, and produce. They have an awning in front of their premises, 25 feet 11 inches long, consisting of an

[1] Part of the opinion is omitted.

iron frame and roof, covered with boards and tin, 14 feet in height next to the building and 12 feet in height at the curb, and extending over the whole sidewalk. This awning was constructed by the grantor of the prosecutors in 1886, and has been maintained there ever since.

It is contended that the ordinance is invalid, in that it is not general, fair, or impartial, but discriminates against individuals within a portion of the city, who are to suffer oppressive interference in the enjoyment of their property, while those who live in the remaining territory of the city are left entirely free from such interference. In support of this contention the prosecutors cite Dill. Mun. Corp. (4th Ed.) § 322, where the principle is laid down that: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person, penal, and if done by another, not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or oppressive interference in particular cases is not to be allowed." This is, without doubt, a well-established doctrine; and, if the ordinance in question is within the principle here delineated, it must fail. But is it? The map presented to us shows that the district covered by the ordinance includes parts of four different wards of the city, and is located at its business center, and includes a large portion of the principal business streets. The principle above alluded to as affecting municipal legislation is not universal in its application to all conditions, and will not necessarily render an ordinance discriminating because it affects a certain class, or is applicable only to a certain designated district or to a certain street. The general and special character of an ordinance must be determined by the facts of each case, and not by any fixed rule. * * *

Applying this view to the case in hand, we think a city council of a populous and growing city might reasonably conclude that a measure so restrictive as this was necessary for public convenience in the crowded thoroughfares of the city, but was not necessary in the less crowded streets, or in those where business places were less numerous. If we could discover from the facts before us that this ordinance was a mere act of caprice on the part of the council, and that in it there was an evident intent not to legislate in the interest of the general public, but to strike at the prosecutors, it would be our duty to condemn the ordinance. But since no such condition appears, we cannot interfere with the ordinance upon the ground just discussed. * * *

The ordinance is further attacked on the ground that it is unreasonable. In support of this averment, the point already discussed is renewed, and it is further urged that the ordinance is an unjust and oppressive interference with the business of the prosecutors and their property rights. This position might appeal to us more strongly if the ordinance in question was not clearly within the powers delegated to the city by the legislature. The charter of the city of Trenton (P. L. 1874, p. 331), after granting to the common council power to make

ordinances and by-laws for the purposes, among others, of preventing and removing all encroachments, obstructions, and incumbrances upon the streets of the city, defines a further purpose for which such ordinances may be passed, as follows: "To prevent or regulate the erection or construction of any stoop, step, platform, bay window, cellar door, area, descent into a cellar or basement, sign or any post or erection, or any projection, in, over or upon any street or avenue, and to remove the same where already erected, at the expense of the owner or occupant of the premises." It will thus be seen that the ordinance in question is phrased almost in the very words of the charter, and that it is clearly within the power granted. Under such circumstances, the presumption is that the ordinance is reasonable; and unless it is clearly shown that the ordinance itself, or the mode of its operation, is unreasonable, the court will not interfere. Paxson v. Sweet, 13 N. J. Law, 196; Trenton Horse R. Co. v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 34 Atl. 146.

There are no special facts brought before us, bearing upon the question, except the nature of the business of the prosecutors, and the fact stipulated that 245 different persons own overhead awnings and swinging signs within the territory defined. We do not regard the latter fact as very convincing upon the charge of unreasonableness. While we realize that such an ordinance may disturb somewhat, and perhaps annoy, the proprietors of business houses affected thereby, still it must be perceived that these erections may obstruct the streets in the congested centers of a populous city, and inconvenience large bodies of people who are entitled to the free and uninterrupted use of the streets for travel or passage. Regard must be had, also, to the fact that such erections, when largely multiplied, may mar the appearance of city streets, and may, through decay or want of repair, become unsightly, and perhaps unsafe to the pedestrian, and that they may obstruct the view, and, to a degree, shut off light and air from persons residing upon the street, in close proximity. These are questions that may justly be considered by the city authorities in deciding upon the propriety of such an ordinance, and hence we conclude that the prosecutors have failed to clearly demonstrate the charge that the ordinance is unreasonable.

With regard to the suggestion that the ordinance is inconsistent with the abutter's property interests, we think the proposition is clearly untenable. The title of the abutting owner may run to the center of the street, as it generally does, but his rights must always be subservient to the public easement. He may make, as of right, all proper uses of the street, subject to the paramount right of the public user, and subject, also, to reasonable and proper municipal and police regulation. 2 Dill. Mun. Corp. 656a; Weller v. McCormick, 52 N. J. Law, 470, 19 Atl. 1101, 78 L. R. A. 798. In the latter case, Mr. Jus-

tice Dixon, in discussing the rights of the abutting owner, says, "He may use the highway in front of his premises, when not restricted by public enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel." No decision has been cited, and we know of none in this state, which asserts the doctrine that the exercise of such rights by the abutting owner is not subject to municipal control. Other authorities supporting this view are Pedrick v. Bailey, 12 Gray (Mass.) 161; Drake v. City of Lowell, 13 Metc. (Mass.) 292; City Council v. Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340; Farrell v. City of New York, 52 Hun, 611, 5 N. Y. Supp. 580; Id. 5 N. Y. Supp. 672; and other cases cited in note 7 of 15 Am. & Eng. Enc. Law (2d Ed.) 499.

The case of State v. Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446, was cited in behalf of the prosecutors, where an ordinance forbidding the suspension of signs over sidewalks was held invalid, as not being within the chartered powers of the municipality. This decision was reached by a divided court, and is clearly distinguishable from the case we are considering.

The result is to affirm the ordinance, with costs.[8]

[8] Affirmed by the Court of Errors and Appeals, 69 N. J. Law, 451, 55 Atl. 1132 (1903).

TORTS

I. Governmental and Municipal Duties Distinguished [1]

CITY OF KANSAS CITY v. LEMEN.

(Circuit Court of Appeals of the United States, Eighth Circuit. 1893. 57 Fed. 905, 6 C. C. A. 627.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action at law by Frank Lemen against the city of Kansas City, Mo., for wrongfully closing an exhibition held by plaintiff in said city. Verdict and judgment for plaintiff. Defendant brings error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge.[2] Frank Lemen filed in the United States circuit court for the western district of Missouri a complaint against Kansas City, a municipal corporation of the state of Missouri, wherein he alleged substantially the following facts: That he was a citizen and resident of the state of Kansas, and the proprietor of a show and hippodrome; that, desiring to exhibit said show in Kansas City, Mo., on the 3d and 4th days of May, 1892, he, before that time, lawfully acquired from the owners of a certain tract of land situated within the corporate limits of Kansas City the right to give an exhibition thereon, and that he took peaceable possession of said land with the consent of the owner, and erected his tents thereon, and that he also fully complied with all of the ordinances and regulations of the city with reference to such exhibitions as he proposed to give, and obtained a license for the exhibition from the proper city authorities, entitling him to give two exhibitions, for which he paid to the city $20; but that on the day appointed for the exhibition, and just before it was to begin, "the defendant, Kansas City, acting by and through its mayor, police, and other duly constituted and authorized agents, (the said mayor,) personally consenting and directing all things, did willfully, with knowledge that they were acting wrongfully, and without right, and with the intention to harass and oppress the plaintiff, and to break up and ruin his said business, with force and violence come upon said land, and with threats and violence did stop plaintiff from prosecuting his said business, and did put a stop to the exhibition of the said show, and

[1] For discussion of principles, see Cooley, Mun. Corp. §§ 115–117.

[2] Part of the opinion is omitted.

did then and there threaten and began to tear down and break and destroy plaintiff's said tents and property, and did with force seize upon the person of the plaintiff and arrest him, falsely pretending that he had violated some city ordinance, * * * and did threaten to arrest and imprison plaintiff's employés unless they desist from carrying on plaintiff's said business, falsely pretending that such employés thereby were violating some ordinance of Kansas City; and did stop, prevent, and warn the people from coming into plaintiff's said show, and from purchasing tickets thereto, * * * and compel and require plaintiff to cancel his appointments to exhibit his show at the place and times aforesaid, and to remove all his property and effects from said tract of land, and did greatly injure and discredit his said business," etc. * * *

The city admitted its corporate capacity, and that the plaintiff intended, and had in fact made preparations, to give an exhibition at the time and place stated in his complaint. It denied, however, that the plaintiff had the consent of the owner of the tract of land described in his complaint to give an exhibition thereon, and averred, to the contrary, that the title to said tract of land was vested in the city, as trustee, to be held for the purposes of a graveyard, and that it had been so vested and held for more than 30 years, and that the remains of many persons had been buried therein, and that many were still entombed in said tract of land. The city further admitted that a license was issued by it to the plaintiff to give an exhibition on said ground, and that he had paid $20 therefor; but it averred that the city had no power to issue a license for a show in a graveyard; and that the police of the city had notified the plaintiff, prior to the intended exhibition, that he could not give an exhibition on the ground selected, because it was a graveyard, and because an exhibition in such place would be a public nuisance, whereupon the plaintiff had withdrawn from said premises, and had removed his tents elsewhere to a place within the city, and had given an exhibition for two days under the license in question. * * *

The distinction that exists between the various powers ordinarily exercised by municipal corporations has been pointed out on numerous occasions, and is well defined. In exercising certain powers, such corporations act for the public at large as governing agencies, and for that reason, when so acting, they cannot be held liable for a misfeasance. When acting in a public capacity, as governing agencies, the rule of respondeat superior has no application to acts done by the officers of such corporations, but the responsibility for a wrongful act rests with the officer, and not with the municipality. In the exercise of many other powers devolved upon municipal corporations, commonly termed "corporate powers," such bodies act for the special benefit of the municipality, or the municipality derives some profit, emolument, or advantage from their exercise, and in such cases the

municipality is liable for acts of misfeasance done by its officers that are positively injurious to individuals.

In Maxmilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468, Folger, J., says: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * * In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for failure to use its power well, or for any injury caused by using it badly; but where the power * * * is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents"—citing Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302.

The distinction thus referred to is also recognized in the state from which this case comes, (Hannon v. County of St. Louis, 62 Mo. 313, 318,) and is stated, and supported by numerous citations, in Dillon on Municipal Corporations, (vide 4th Ed. §§ 966–968, 974.)

In the case at bar we feel constrained to hold that the wrongful act complained of was done by the city under color of a power which it exercises as a governing agent for the benefit of the public at large, and not for the advantage of the inhabitants of Kansas City, except as they form a part of the general public. The establishment of a public show, such as a menagerie, circus, or hippodrome, on a tract of land dedicated to a city or town for the purposes of a graveyard, and actually used as such, would constitute a public nuisance. A city has no more right to license a show of that nature in a graveyard than it has to license it to locate on the public streets and thoroughfares; and we entertain no doubt that when a municipality undertakes to prevent or to abate a nuisance of that kind by means of its police force it is acting for the state as a governing agency, and not merely in the discharge of a purely corporate power or duty. * * *

In a comparatively recent case—Culver v. City of Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270—it was held that the city was not liable for the negligent act of one of its police officers while endeavoring to enforce an ordinance forbidding dogs to run at large without being muzzled, for the reason that in the making and enforcement of the ordinance the city was acting merely as agent of the state in the discharge of duties imposed by law for the promotion of the general welfare. The court said that the ordinance was

passed in pursuance of the police power vested in the municipality, and that acts performed in the exercise of that power were done in a public capacity as a governing agency, and not for the special advantage of the municipality.

It is also very generally held that a city is not liable for wrongful acts committed by its police officers in enforcing city ordinances, or in making arrests for alleged violations of law or local ordinances, or while endeavoring to suppress an unlawful assemblage, because while acting in such matters, police officers are not mere servants of the municipality, and the rule of respondeat superior does not apply. Buttrick v. City of Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721; Fox v. Northern Liberties, 3 Watts & S. (Pa.) 103; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; Odell v. Schroeder, 58 Ill. 353; Elliott v. Philadelphia, 75 Pa. 347, 15 Am. Rep. 591; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Little v. City of Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793; Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Worley v. Inhabitants, 88 Mo. 106; Dill. Mun. Corp. § 975.

We can entertain no doubt, therefore, that for the acts complained of in the present case there is no right of redress against the city, assuming them to have been done or authorized by the city, as stated in the plea, for the purpose of preventing a public exhibition on a tract of land dedicated and used as a graveyard. The act of the municipality in that behalf was an exercise of a power vested in it to promote the general welfare, as contradistinguished from those corporate powers which it exercises for the special advantage of the municipality. * * *

Furthermore, if it be true, as suggested, that the city knew that the premises were not a graveyard, and that they were in fact private property, and that it had some ulterior object in view, and intended to wrong and oppress the plaintiff, then it is difficult to escape the conclusion that the acts said to have been committed by the police with the sanction of the mayor were so utterly beyond the scope of any corporate power vested in the municipality, that it could not be held liable on that ground. Dill. Mun. Corp. §§ 968–970.

Our conclusion is that the circuit court erred in refusing to direct the jury to find a verdict in favor of the city, wherefore the judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

ADDINGTON v. TOWN OF LITTLETON.

(Supreme Court of Colorado, 1911. 50 Colo. 623, 115 Pac. 896, 34 L. R. A. [N. S.] 1012, Ann. Cas. 1912C, 753.)

Action by Bella D. Addington against the Town of Littleton. From a judgment in favor of defendant, plaintiff brings error.

MUSSER, J. This was an action to recover damages from the defendant town for injuries inflicted by a vicious dog running at large. The complaint alleges that an ordinance in the town of Littleton provided that no dog should be permitted to run at large in the town without a license tag, that it was the duty of the town marshal and all police officers to take up and confine all dogs found running at large contrary to the ordinance, that it was unlawful for any vicious dog to run at large within the town limits, and that it was the duty of the marshal and police officers to kill any vicious dog found running at large. The complaint further alleges that the town neglected to enforce the ordinance and violated its duties and obligations in that respect, by knowingly permitting an unlicensed and vicious dog to run at large on the streets, and that while the plaintiff was walking in the town she was attacked by this vicious dog and received the injuries complained of. A demurrer was sustained to this complaint. Plaintiff elected to stand thereon. Judgment was entered against her, and she has brought the matter to this court for review on error.

The duty imposed by the ordinance upon the marshal and police officers to take up or kill vicious dogs found running at large in the street was imposed under the governmental powers of the town, and not in its private corporate capacity. This being so, it is not liable for the failure of its officers to enforce the ordinance.

The plaintiff argues that the town is liable for injuries caused by a failure to keep its streets in a safe condition for travel. The manner in which a street is used is a different thing from its condition as a street. The construction and maintenance of a street in a reasonably safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental and not corporate powers, and for any act or omission of duty in regard to the enforcement of such ordinances there is no liability in the absence of a statute imposing one. McAuliffe v. City of Victor, 15 Colo. App. 337, 62 Pac. 231; Denver v. Maurer, 47 Colo. 209, 106 Pac. 875, 135 Am. St. Rep. 210; Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293, 11 Ann. Cas. 187; 2 Dill. Mun. Corp. (4th Ed.) § 950; Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846, 47 Am. Rep. 805; Rivers v. City Council of Augusta, 65 Ga. 376, 38 Am. Rep. 787; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; Lafayette v. Timberlake, 88 Ind. 330.

The judgment is therefore affirmed.

CUNNINGHAM v. CITY OF SEATTLE.

(Supreme Court of Washington, 1905. 40 Wash. 59, 82 Pac. 143, 4 L. R. A. [N. S.] 629.)

Action by R. Cunningham against the city of Seattle. From a judgment for plaintiff, defendant appeals.

CROW, J. Respondent instituted this action against the city of Seattle, appellant, to recover damages occasioned by a certain horse trespassing upon and destroying respondent's lawn. On trial the court made findings of fact to the effect that on September 6, 1904, appellant city was maintaining near respondent's residence a certain engine-house as a part of its fire department, and keeping there numerous horses; that on said date, through the negligence of said city, one of said horses trespassed upon respondent's lawn, by running over, tearing up, and destroying the same; and that said horse was owned, kept, and used by said city exclusively in said fire department. Upon said findings judgment was entered in favor of respondent, and this appeal has been taken.

It clearly appears from the evidence that said horse was in the exclusive charge, care, and control of the regular employés of said fire department. Appellant contends that no negligence on the part of the city or its employés has been shown; but, without passing on that question, we will, in disposing of this case, accept the findings as made by the trial court. Appellant further contends that, even though negligence be conceded, still it is not liable to respondent for any damage caused by its employés in the maintenance and operation of its fire department. This contention, we think, should be sustained. The maintenance of a fire department by a municipal corporation is the exercise of a public or governmental function. "The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties." 20 Am. & Eng. Ency. of Law (2d Ed.) 1193.

The only question here is whether appellant is liable for damage done to respondent's property by reason of negligent acts of the members of its fire department. Under the authorities this question has been almost uniformly answered in the negative. The Supreme Court of Ohio in Frederick v. City of Columbus, 58 Ohio St. 546, 51 N. E. 35, says: "The ground on which the nonliability of municipal corporations is placed in such cases is that the power conferred on them to establish a department for the protection of the property of its citizens from fire is of a public or governmental nature, and liability for negligence in its performance does not attach to the municipality unless imposed by statute. The nonliability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers, and are distinguished from those cases in which powers

are conferred on cities for the improvement of their own territory and the property of their citizens."

The holdings of this court have been to the same effect. Lawson v. Seattle, 6 Wash. 185, 33 Pac. 347; Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; Simpson v. Whatcom, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; Lynch v. City of North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261. In Lynch v. City of North Yakima, this court, speaking by Root, J., said: "But it may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. The duties of an officer or employé of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body. The city, possessing, as it does, a portion of the sovereignty of the state, in the exercise thereof provides and maintains a fire department. The services of this department are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions."

Under the above authorities, we think the city of Seattle was not liable to respondent for damages resulting from negligent acts of the employés in its fire department. The trial court, therefore, erred in entering judgment for said respondent. The judgment is reversed, with instructions to dismiss the action.[3]

II. Care of streets [4]

JACKSON v. CITY OF GREENVILLE.

(Supreme Court of Mississippi, 1894. 72 Miss. 220, 16 South. 382, 27 L. R. A. 527, 48 Am. St. Rep. 553.)

Action by D. D. Jackson against the city of Greenville. From a judgment in favor of defendant, plaintiff appeals.

WOODS, J.[5] This action was brought by the appellant for the recovery of damages for injuries sustained by him in consequence of defects in a sidewalk in the city of Greenville, negligently suffered to exist. * * * Was the appellant, at the time of receiving the injury, making such use of the street and sidewalk as will entitle him to a recovery for hurt suffered by reason of defects in the sidewalk?

[3] The dissenting opinion of Rudkin, J., is omitted. Rehearing denied March 5, 1906. See 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805.

[4] For discussion of principles, see Cooley, Mun. Corp. § 118.

[5] Part of the opinion is omitted.

It is elementary law that streets are primarily designed to be used for purposes of transportation and travel; and the authorities are uniform to the effect that, in the absence of any express statute creating liability, municipal corporations, clothed with plenary and exclusive control over their streets, are yet liable, by implication, for injuries resulting to persons properly using such streets, for failure to maintain the same in a reasonably safe condition for travel. That the rule as stated is substantially recognized and applied by the courts in cases of statutory and of implied liability will appear by examination of the adjudications of courts of last resort in both classes, and any seeming want of harmony will, in most instances, appear to have arisen from failure to confine the language of the several courts to the facts of the particular case. What are the facts as shown in the evidence introduced on trial below by the appellant, which are supposed by counsel for appellee to bar any recovery herein? * * *

The case thus presented is that of a man of full age using the sidewalk, not for the purpose of travel, either for business or exercise or pleasure, but for the sole purpose of playing with a dog. The appellant had come out of his boarding house to the sidewalk. He was standing, and was not going anywhere. He was playing with the dog, and was standing with his back to the roadway, and his face turned towards the palings, when, in an effort to catch the dog, running between him and the fence, he stepped, and received his injury. Can it be satisfactorily gathered from the above statement that the appellant, when hurt, was making such reasonable use of the street or its sidewalk, at the time of receiving the injury complained of, as will bring him within the category of those for whom streets and sidewalks are designed? Was he a traveler on or along the street, who, incidentally halting or turning aside upon his way, received his hurt? Was the municipality under any duty to the appellant to keep in repair the sidewalk so that he might safely use it for the purpose of his play with the dog?

Streets, we repeat, are designed for travel, primarily; and though it must be conceded that one using the street for travel may incidentally cease to move on continuously, and yet not lose his right as a traveler on the highway, yet it cannot be deduced from this concession that one not using the street for travel may, nevertheless, convert it, or part of it, into a playground, and in so using it, if injury occur while so using or misusing the street, by reason of defects in it, hold the negligent municipality liable. To recover, the injured party must fix liability upon the municipality; and, to fix liability, the sufferer must show failure on its part to discharge a duty to him. But the duty to repair and keep in reasonably safe condition streets and sidewalks is due only to those using the highways for the purposes of their creation. If a football team appropriate a street to its uses in playing a game, and one of the players fall into a hole in the roadway, and injury result, would any one be found to say that he could rightfully

complain and recover? In such case the injured player clearly would be frustrating the very end for which highways are ordained, viz. the convenient and safe transportation and travel of property and persons. It seems to us indisputable that one contravening the law of the creation, and the ends for which it was created, cannot be heard to complain if ill befall him because of his own wrongdoing.

Many cases have been examined by us where liability was imposed and recovery had for injuries to children, not of the age of discretion, when playing on the streets or highways; but all such cases, on well-understood legal principles, are readily distinguishable from the case at bar. Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860, and Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65, cited in the brief of appellant's counsel, are of this character. Our own adjudications are along the same line, in like cases. Mackey v. City of Vicksburg, 64 Miss. 777, 2 South. 178; Vicksburg v. McLain, 67 Miss. 4, 6 South. 774.

When we come to consider the cases referred to by the counsel wherein adults received injuries in streets, we shall discover that none of them, on their facts, at all resemble the case at bar. The sinewy, lucid, and caustically humorous opinion in Varney v. Manchester, 58 N. H. 430, 40 Am. Rep. 592, was upon these facts, in a word, viz.: Varney, the plaintiff, went to a certain street in Manchester for the purpose of seeing a procession form on Decoration Day. He went down one side of the street to the place where the procession was forming, and crossed over the street to get a better view. He stood looking at the forming of the procession, near a pile of lumber; and, after so standing and looking from three to five minutes, the lumber fell, and crushed his foot. Held, that a person is "traveling upon a highway" when he is making a reasonable use of a highway as a way, and that the law does not prescribe how long one may stand on a street without ceasing to use the way as a way; but that the question was one of reasonable use, and this was for a jury's determination, if there is any evidence on which they could properly find the use was reasonable.

The case of Murray v. McShane, 52 Md. 217, is that of an adult lawfully passing along a street, and stopping for an instant on a door-sill of a house fronting the street, for the purpose of adjusting his shoe, and suffering injury in consequence of a brick falling from a dilapidated wall, negligently permitted to remain there. Held, that travelers on a street have not only the right to pass, but to stop on necessary and reasonable occasions, so they do not obstruct the street or doorway.

In Duffy v. City of Dubuque, 63 Iowa, 171, 18 N. W. 900, 50 Am. Rep. 743, the facts were that Duffy, who was a workman, went to the corner of the two intersecting streets for the purpose of doing some work on a house there situated. After he had unloaded some stuff from a wagon, he went along the sidewalk to a hydrant eight feet

in rear of the house and a foot or two from the line of the sidewalk. While in the act of drawing water from the hydrant, with one foot on the ground, and the other on the sidewalk, a section of a roof, negligently left standing near, was blown over by a gust of wind, fell on Duffy, and inflicted the injuries of which he complained. Held, that Duffy's stopping to draw water as stated was the exercise of a privilege which he might lawfully enjoy, and was a mere incident to the general use of the street which he was making.

The opinions of the New England courts, when liability in the character of cases which we are considering is of statutory creation, and in which, as is sometimes charged, extreme and antiquated views are announced, it will be found, on careful analysis, are not out of general accordance with the spirit of the most, not to say all, of the decisions elsewhere which we have examined. In the case of Blodgett v. City of Boston, 8 Allen (Mass.) 237, while the court deny the liability of the city for injuries received by a boy 11 years old, who was using the plank sidewalk on the street with another boy for purpose of play only, yet the opinion is careful to limit the effect of the decision by saying: "We do not certainly think any narrow or restricted signification should be given to the word 'traveler,' as used in the statute. It may well embrace within its meaning, as applied to the subject-matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. * * * We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist in such case the important element that the person injured was actually traveling over the way. But this element is wholly wanting in the case at bar."

Here, as in the case just quoted from, the important element of actual use of the way for the purpose of travel is wholly absent. Here, as there, the case shows an appropriation of a sidewalk to a use other than, and inconsistent with, that for which the highway was established. Here, however, the offender against the rights of the public was an adult, and not a child of debatable discretion. Here, in addition, the play with the dog was not a mere incident to the general and proper use of the sidewalk by the appellant in passing along or over it. The city owed him no duty, in his situation, and using the street as he was doing. The duty was on the municipality to keep and maintain the street in reasonably safe repair for travel, and liability ensued upon injury befalling one going along or over it, whether for purposes of business or pleasure, by reason of failure to keep and perform this duty. But to one simply using the street or sidewalk as a playground the city owed no duty to keep its streets for him so engaged in any repair. Affirmed.

TICE v. BAY CITY.

(Supreme Court of Michigan, 1891. 84 Mich. 461, 47 N. W. 1062.)

MORSE, J.[6] This case has been in this court once before, and will be found reported in 78 Mich. 209, 44 N. W. 52.

The plaintiff sues for damages occasioned by her foot being caught in a hole in the sidewalk upon the east side of Jefferson street, in Bay City, at a point about midway between two gates, leading into the county jail premises, the gates being 75 feet apart. Two facts are settled beyond dispute by the record: First, that the plaintiff was injured by getting her foot into a hole in the sidewalk in the locality described in her declaration; and, secondly, that there was no proof that any officer of the city had actual knowledge of the existence of this hole prior to the accident. There is no claim of any contributory negligence on the part of the plaintiff, and the main issue, therefore, was whether the hole had existed in the sidewalk so long that the city was in duty bound to take notice of its existence. * * *

The accident to plaintiff occurred on the 6th day of December, 1887. The law of 1887, creating a liability in cases of defective sidewalks, took effect September 28, 1887. Testimony was introduced on the part of the plaintiff tending to show that the defect in the sidewalk, of which she complained, existed in the months of May, June, July, and August, 1887. This testimony was objected to, and the court was asked to instruct the jury that they could not consider the evidence as to the condition of the sidewalk in those months, because at that time the city was not liable for any defects in the sidewalk. This request was properly refused. If this hole existed prior to September 28, 1887, and continued up to December 6, 1887, the city was not only bound to take notice of it, but in law had ample time between these last two dates to repair the sidewalk. The defendant was not authorized to leave the sidewalk as it was on the day the law took effect. If, after that, the city continued to maintain the sidewalk, it was its duty to put it in good repair, and to keep it reasonably safe for public travel; and the length of time it had been out of repair was a legitimate subject of inquiry, without reference to the date that the law went into effect.

Objection is also made that testimony was admitted of the condition of the walk at other places than where the injury occurred. The evidence was not only confined to the space between the two gates, but to near the middle of such space. The testimony developed that there was more than one hole there, and some of the witnesses, not knowing in which hole the plaintiff was injured, were interrogated on both sides as to the location of the holes they observed; but the jury were instructed that plaintiff could not recover unless the city had knowledge, actual or constructive, of the identical hole into which the

[6] Part of the opinion is omitted.

plaintiff stepped, and that the existence of the other holes was not permitted to be used to show notice of this particular defect. There was therefore no error in the admission of this testimony.

The defendant's counsel asked the following instruction to the jury: "If you find that the street commissioner went over this walk within two weeks previous to the accident, that he looked out for defects in a careful manner, and did not see this defect, and had no actual knowledge of its existence, then he used such care and diligence as was required of him, and the city is not liable;" which request the court gave, with the following addition: "But in determining the fact whether he did go over it within two weeks, and did look out for defects in a careful manner, and did not see this particular defect, you may consider all the testimony in the case as to the existence of the hole previous to the time he went over the place, and, if you find the hole was there when he examined it, you may consider this in determining whether he did use due care." This addition was good law, and very properly made under the circumstances, there being testimony in the case that the hole had been there for months. * * * Affirmed.

JONES v. CITY OF CLINTON.

(Supreme Court of Iowa, 1896. 100 Iowa, 333, 69 N. W. 418.)

Action at law to recover damages alleged to have been sustained by the plaintiff by being thrown out of a buggy while traveling on one of the streets of the defendant city. There was a trial by jury; verdict and judgment for the plaintiff. Defendant appeals.

ROTHROCK, C. J.[7] The plaintiff and one Jackson, while riding along one of the streets of Clinton in a buggy, drove the horse into an open ditch or trench, and they were thrown out of the vehicle in which they were riding, and the plaintiff claims that she was seriously injured. The action is grounded upon the alleged negligence of the city in not protecting the traveling public from injury by reason of the trench in the street. The accident occurred in the evening, between twilight and dark. There were lights in some of the stores on the street. No lights were necessary to discover the trench in the street. The earth taken from the excavation was deposited in the street. A man on a load of hay, across the street, saw the obstruction, and called aloud to Jackson, warning him of the danger. The trench was dug by the employés of Kendall & Co., plumbers, engaged in plumbing, digging trenches, and repairing water pipes. A service water pipe in the street bursted, and, in order to repair it, the employés of Kendall & Co. made the excavation. One of these employés was examined as a witness in behalf of the plaintiff. The following is part of his testimony: "I don't know the exact date of

[7] Part of the opinion is omitted.

this accident. I remember of the accident, and it was on the day of that accident that I commenced work, not on the day before. I commenced at one o'clock in the afternoon. I dug up the paving, and was digging the ditch to repair a leak in the service water pipe that ran around across the street to William Kreim's property. * * * After I had got done with it, I hung out a lantern that evening. * * * I was not right there at the time of the accident. I had just stepped across the sidewalk, into Janssen & Struve's yard. * * * It was about 25 or 30 feet from where this ditch was where I stepped into the yard. * * * I was gone not over three minutes. I went right back to the ditch, and, when I got back to the ditch, the accident had happened. Before I went into the yard, I did not see any person or vehicle passing, or any teams standing about there, except a load of hay in front of Mallman's grocery. * * *" There was no evidence which can be said to be in conflict with the testimony of this witness, except that one or more witnesses testified that they thought the work was continued in the street for two days. But we think the jury should have found that there was no real danger after the earth was put back in the trench on the evening of the accident. The signal light was, doubtless, placed in the street because the brick paving had not been replaced.

It appears that the plumbers made the excavation without any permit from the city authorities; and the proper officers of the city had no actual knowledge of the excavation. A motion was made at the close of the introduction of plaintiff's evidence that the court direct the jury to return a verdict for the defendant. The motion was overruled. We think it should have been sustained. There being no actual notice to the city, and there being no such lapse of time as that the city could properly be charged with constructive notice, there was no right of recovery. It will be understood that such excavations in streets are at times necessary. If the work is done in a proper manner, and signal lights are put in proper position, or guards or barriers are erected when the work is left by the laborers at night, no one is chargeable with negligence. While the workmen are present, and engaged in the work during the day, no such protection is necessary. It would be carrying the doctrine of constructive notice to an unwarranted extent to hold that a jury might find the city negligent because, before the close of the day, the laborer absented himself from the work for a few minutes, for a necessary purpose. * * * Reversed.

III. Obstructions [8]

THUNBORG v. CITY OF PUEBLO.

(Court of Appeals of Colorado, 1902. 18 Colo. App. 80, 70 Pac. 148.)

Action by C. A. Thunborg against the city of Pueblo. Judgment for defendant, and plaintiff brings error.

THOMSON, J. C. A. Thunborg brought this action against the city of Pueblo to recover damages for injuries sustained by him on June 24, 1898, by coming into collision with a hydrant or fire plug hidden by weeds and sagebrush, while driving along Court street, a public street of the city, in the evening. The complaint charged negligence against the city in suffering a growth of weeds and brush to conceal the fire plug, and alleged want of knowledge in the plaintiff of its existence. The answer denied negligence on the part of the city, and alleged that the street was but little used, and that the plaintiff was guilty of contributory negligence in driving at a furious and unlawful rate of speed. The defendant had judgment, and the plaintiff appealed.

The following facts appeared from the evidence: The street was a public and much-used thoroughfare. The fire plug was but a few inches from the beaten roadway, which deviated towards it to avoid a puddle of mud, and was concealed by a thick growth of weeds and sagebrush. The same conditions had existed there for at least three years previous to the accident, the weeds being renewed every spring, and the sagebrush remaining constantly. The injuries received by the plaintiff were severe and permanent. It was dark, or nearly dark, when the accident occurred. The plaintiff testified that on the evening of the accident he was returning to his home in a cart; that when nearly opposite the fire plug, which he had never seen, and the existence of which he did not suspect, he saw another vehicle approaching him in the roadway, which he could not pass except by entering the weeds and brush; that, to avoid a collision, he turned to the right into the weeds and brush, struck the fire plug, and was thrown to the ground; and that when approaching the place where the fire plug was located his horse was going at an ordinary trot. It was testified that in the previous summer another person, meeting a team in the same locality, turned into the weeds and brush to avoid it, struck the fire plug, and broke his buggy; and that at still another time, at the same place, there was a narrow escape from the same kind of accident. Mr. E. Settles, the man in the buggy which the plaintiff turned out of the road to avoid, stated that he heard the

[8] For discussion of principles, see Cooley, Mun. Corp. § 119.

rattle of the plaintiff's cart; that it seemed to him, from the great noise the cart was making, that some one was driving very fast, or that the horse was running away; that it was nearly dark, and he could not see whether the horse was trotting or loping; that, when almost opposite to him, the plaintiff left the road and struck the fire plug; and that he went to the plaintiff, and asked him why he was driving so fast, and the plaintiff answered that he was driving a new horse, and could not hold him. Witness also stated that the plaintiff was very much stunned by the fall. Two members of the police force of the city, who took the plaintiff to the hospital, said he told them that his horse was running away at the time of the accident. They also said he was suffering frightful pain. In rebuttal it was shown that, owing to the play of the spokes in the hubs, the plaintiff's cart, which was very old, was extremely noisy.

The fire plug was lawful and necessary in the place it occupied, yet, by reason of its being concealed from view, it became a menace to the safety of travelers. It appears that it was very close to the edge of the beaten roadway, and that a vehicle passing at that point could be avoided only by turning towards it; and this one having no reason to suspect that he would encounter anything more dangerous than weeds or sagebrush would not hesitate to do. The plaintiff, being lawfully on the street, for the purpose, as he supposed, of preventing a collision, turned his horse into the harmless appearing growth of vegetation, with the result that he suffered permanent injury. That the city had actual or implied knowledge of the existence of the conditions which rendered its fire plug dangerous to travelers is not disputed, and we think its negligence was established beyond question. If, however, as to the question of the city's negligence, it could be said that the evidence left room for a difference of opinion, the court's third instruction, which was given by consent, contained a fair statement of the law; and, in so far as other instructions were inconsistent with it, they were erroneous. But while, respecting the duty and responsibility of the city in relation to the cause of the accident, the court correctly declared the law, on the question of contributory negligence it committed fatal error. In submitting that question to the jury the following language was used: "The jury are further instructed that if they find from the evidence that the plaintiff was traveling at a furious and rapid rate of speed, and that such act on his part was the cause of the injury, and that he would not have suffered the same had he been driving at an ordinary and prudent rate of speed, then it is immaterial, so far as this defense is concerned, whether his so traveling was intentional on his part, or the result of his inability to restrain his horse."

Negligence is want of care. It consists in omitting to do something which should be done, or inconsiderately doing something in an improper manner. The term supposes the ability to do the thing

omitted or to do the thing undertaken properly. It cannot be applied to an act or omission which is compulsory. There was no proof of rapid or furious driving by the plaintiff. The only evidence warranting a supposition that the horse was exceeding his ordinary speed is found in statements of the plaintiff made when stunned by the fall; and, according to the same evidence, the horse was, at the time, beyond control. If the horse was going excessively fast, it is quite material whether the plaintiff was able to restrain him or not; for, unless the plaintiff was himself responsible for the immoderate speed, it constitutes no defense to the city. City of Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621; City of Crawfordsville v. Smith, 79 Ind. 308, 41 Am. Rep. 612; Ring v. City of Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Baldwin v. Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33.

Let the judgment be reversed. Reversed.

IV. Sidewalks [9]

BLYHL v. VILLAGE OF WATERVILLE.

(Supreme Court of Minnesota, 1894. 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596.)

Action by Alexander Blyhl against the village of Waterville to recover for personal injuries. Judgment for the plaintiff. Defendant appeals.

GILFILLAN, C. J. The defendant, a municipal corporation, required an owner of a lot abutting on one of its streets to construct a plank walk along the street by the side of his lot, and he constructed it on a grade given him by, and under the direction and with the approval of, defendant's street commissioner. As constructed, the walk made, at the junction of this new walk with the walk along the remainder of the block, a drop or step seven or eight inches in height. It is apparent there was no necessity or reason for having the drop instead of gradually sloping the grade of the new walk until it came to the grade of the remainder. It is also apparent that so sloping it would have made a safe walk, and that the drop made it dangerous to one passing along it in the dark. After the walk had been in that condition for about a month, plaintiff, passing along it in the dark, hit his foot against the face of the drop, and fell, and was injured, and brings this action to recover for the injury. From a judgment after verdict in his favor the defendant appeals.

[9] For discussion of principles, see Cooley, Mun Corp. § 120.

Unless the defendant is exempt from liability on the ground claimed by it as hereinafter stated, the existence of the drop in the sidewalk to the knowledge of defendant, through its street commissioner, was sufficient to make defendant's negligence a question for the jury. Tabor v. City of St. Paul, 36 Minn. 188, 30 N. W. 765. The defendant claims it cannot be held, because the defect in the walk was in the plan on which it was constructed; that the adoption by a municipal corporation of a plan for a public improvement is a legislative or discretionary function, and that the corporation is not liable for the consequences of any error in the discharge of such functions. That a municipal corporation is not liable for consequential injuries arising from the bona fide exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body, has been fully recognized by this court. Lee v. City of Minneapolis, 22 Minn. 13; Alden v. Same, 24 Minn. 254. Most municipal public improvements come within such powers. Thus, unless controlled by charter provisions, when street grades shall be established, and on what planes or levels; when grades shall be changed, and to what planes; when streets shall be paved, and with what kind of pavement; when sidewalks and crosswalks shall be laid, and of what material; what sewers, gutters, and catch basins shall be made, and when and how,—are usually left to the judgment or discretion of the legislative body of the corporation. And while, of course, it is expected the best results to the people of the corporation will follow the efforts of that body, it is not enjoined as a duty to produce any particular result, so that failure to bring it about will make the corporation liable for consequential injuries.

The matter of keeping streets and sidewalks in safe condition stands on a different footing. It has always been held in this state that a municipal corporation having exclusive control of its streets, when the means are within its power, has imposed on it a positive duty to keep such streets in reasonably safe condition. Scores of recoveries for injuries resulting from neglect of that duty have been sustained in this court. The first formal statement of the rule was in Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284), in these words: "It is well settled that a municipal corporation having the exclusive control of the streets and bridges within its limits, at least if the means for performing the duty are provided or placed at its disposal, is obliged to keep them in a safe condition; and if it unreasonably neglects this duty, and injury results to any person by this neglect, the corporation is liable for the damages sustained." In this particular there is not only a power conferred, but there is also a duty imposed, to use the power with a view to a particular result, to wit, the safe condition of the streets. Of this duty Dill. Mun. Corp. (4th Ed.) § 1023a, says: "Which duty is not legislative or judicial, but rather, in its nature, ministerial." It is

therefore not left to the corporation's legislative body to determine when or to what extent the duty shall be performed, nor to determine it has been performed; for, if it were, it would be a discretionary, not a positive, duty. That the safe condition of streets concerns the safety of life and limb, and not only convenience or property, is a reason for imposing a duty in respect to it greater than is imposed with respect to other matters of public improvement.

No question is made, nor can there be, on the decisions that, if a dangerous defect is due to wear, decay, accident, or the act of a third person, the corporation, upon notice of it, must seasonably repair it. In this case, if the property owner had, without authority, constructed the sidewalk with the dangerous defect, it would have been the duty of the corporation to seasonably remedy it. The corporation might adopt or ratify the plan on which the owner constructed the walk; but to hold that by so adopting or ratifying it it could avoid the duty to remedy the defect would enable it to determine whether it would perform the duty imposed on it or not, and it would cease to be a duty. And if the corporation is not liable in case of a dangerous defect in a street or sidewalk, because the defect is in the plan previously adopted for its construction, then, although it is its duty to keep the streets in safe condition as against natural causes or the acts of third persons, it is not its duty to keep them in such condition as against its own acts. And whether it is its duty or not will depend on whether it is responsible for the unsafe condition; and if it may, without liability, determine in advance, in adopting a plan for construction, that a certain condition of the street or walk will be safe enough, we do not see upon what principle it is to be liable if, after the condition exists, from whatever cause, it determines the street or walk to be safe enough, and to need no repair.

We have not used the term "positive duty" in the sense that the corporation insures the safe condition of its streets, or that it is bound to maintain them in that condition without reference to the difficulties in the way of doing so. There may be defects that are practically irremediable. The topography of the ground may be such as to render it practically impossible to have the streets entirely safe. In that case the people must accept such as with reasonable efforts can be provided. The law does not require of the corporation unreasonable things, but only that it shall employ, in performing its duty as to streets, the diligence, care, and skill that an ordinarily prudent person having a similar duty to perform would employ. If it do so, there is no unreasonable neglect. So far as concerns the safe condition of a street or sidewalk, the same requirement applies to adopting a plan either for its construction or repair. Of course the corporation would not be liable merely because, in the opinion of a jury, a safer or better plan might have been adopted. To illustrate, we may suppose a not uncommon case, where, owing to the character of the surface, a sidewalk must be constructed on

one of two plans, each leaving it more or less unsafe,—one requiring a slope so steep as to be unsafe; the other, steps that will make it unsafe. The corporation would not be liable for the dangers in the plan adopted merely because, in the opinion of a jury, the other would have been safer. To make the corporation liable, the plan adopted would have to be so much and so obviously more unsafe than the other as to show a neglect to employ the diligence, judgment, and skill in determining the plan which ordinary care would require.

We are cited to some decisions in Michigan, New York, and Pennsylvania to the effect that a corporation is not liable for the consequences of a dangerous defect in a street or walk due to the plan adopted for its construction, because it is only an error of judgment in a matter resting wholly in the judgment or discretion of the corporation. Those decisions are irreconcilable in principle with other decisions of the same courts, and inconsistent with the proposition that keeping streets in reasonably safe condition is a matter of positive duty, and not of discretion. We are therefore of opinion that the mere fact that an unsafe condition of a street is due to a defect in the plan for its construction will not shield the corporation from liability for injuries caused by such unsafe condition.

There is no merit in any of the other points made by appellant. Judgment affirmed.[10]

JACKSON v. CITY OF GREENVILLE.

(Supreme Court of Mississippi, 1894. 72 Miss. 220, 16 South. 382, 27 L. R. A. 527, 48 Am. St. Rep. 553.)

See ante, p. 281, for a report of the case.

CITY OF WABASHA v. SOUTHWORTH.

(Supreme Court of Minnesota, 1893. 54 Minn. 79, 55 N. W. 818.)

Action by the city of Wabasha against Asahel D. Southworth to recover the amount plaintiff was required to pay one Schinzel for injuries sustained by a defective sidewalk along defendant's premises. Plaintiff had judgment, and defendant appeals.

MITCHELL, J. If the findings of fact were justified by the evidence, there is nothing new or doubtful in the law governing this case. In order to entitle the plaintiff to recourse on the defendant for the money which it had paid in settlement of the claim of Schinzel for injuries sustained by reason of the defective sidewalk, it was necessary to establish—First, that the city was liable to Schinzel

[10] The opinion of Canty, J., is omitted.

by reason of negligence in the performance of its duty to the public to keep its streets in safe condition; and, second, that defendant was also liable to Schinzel by reason of his negligence in constructing or maintaining the nuisance in the street which caused the injury. If these two facts were established, then the right of the city to recourse against the defendant is not, and could not successfully be, denied.

There is nothing in the point that the mode of procedure prescribed by the city charter (Sp. Laws 1889, c. 13, subc. 7, § 16) is exclusive, and that the city's only remedy was to let the claim of Schinzel go to judgment against both it and Southworth, pay the judgment, and then enforce it against Southworth. This, like similar provisions in other charters, is designed to aid and not to hinder cities in dealing with such claims, so that the liability of a third party may be determined and enforced in the same action in which that of the city is determined and enforced. The only effect of the city's settling the claim without such judgment was that the questions upon which the liability of Southworth depends were left open. See Jones v. City of Minneapolis, 31 Minn. 230, 17 N. W. 377; Clark v. City of Austin, 38 Minn. 487, 38 N. W. 615; Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698.

The court found that the city might, by the exercise of ordinary care, have known of the unsafe condition of this sidewalk in time to repair it before the accident occurred. This finding, which is not assailed, settles the question of the city's liability to Schinzel.

Passing over the finding to the effect that this hatchway in the sidewalk was originally constructed in a negligent and unsafe manner, (which we think was justified by the evidence,) the court further found that the defendant knew, or by the exercise of ordinary care might have known, of the existence and character of this hatchway and covering at the time he purchased the property; also, that for more than a year prior to the accident he had negligently suffered and permitted this covering or trapdoor over the hatchway to become decayed and unsecurely fastened and supported, whereby the sidewalk over the excavation underneath became and was unsafe for ordinary travel. That the first part of this finding was supported by the evidence is beyond question. Indeed, we think the evidence was such as to require a finding that defendant had actual knowledge of the existence and character of this hatchway as long ago as the date of his purchase of the undivided half of the abutting property in 1873. Nor in our opinion is there any more room for doubt as to the sufficiency of the evidence to justify the latter part of the finding. The defendant maintained this hatchway in the street by allowing it to remain there, with knowledge of its existence. The fact that he had not used it for some years is immaterial, and the claim that he had relieved himself from responsibility by abandoning it is without merit. Having been constructed in the street for the convenience of his abut-

ting property the only way he could relieve himself from the duty of keeping it in repair was to restore the street to its original condition by filling up the excavation and replacing the stringers under the sidewalk. Nichols v. City of Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56.

The negligence of the defendant in the maintenance of this hatchway or cellar way we place upon his lack of ordinary care in not taking reasonable precautions to keep it in safe condition, and not upon the ground that all excavations, basement or cellar ways, scuttles, and the like, made or constructed in the street without affirmative municipal license, are per se unlawful, and nuisances. Numerous reported cases, both in this country and England, show that it has been assumed, time out of mind, in accordance with a custom of long standing, that, even in the absence of any express license, this is a legitimate use of the street for the convenience of abutting property, provided it be exercised in a proper and safe manner, and consequently that the property owner is not an absolute insurer against all injuries resulting from the existence of such things in the street, but is only responsible for negligence or want of reasonable care in their construction or maintenance. This we deem the correct view of the law on this subject. See Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422.

But such structures having been placed in the street for the convenience of the abutting property, it stands to reason that, as between the property owner and the city, the duty of maintaining them in a safe condition devolves on the former. Defendant was bound, in the exercise of ordinary care, to take notice of the fact that wood will decay. Landru v. Lund, 38 Minn. 538, 38 N. W. 699. The fact that the planks forming the cover of this hatchway showed no signs of decay on the upper side did not justify the defendant in assuming, without inspection, that they and the stringers on which they rested had not, in the 18 years or more that they had been there, become rotten underneath, where they were excluded from the sun and subjected to constant moisture. Leaving these planks, which were a part of a public sidewalk, over an excavation five or six feet deep, with the middle stringers of the sidewalk cut away, the only support of the planks being at the two ends, the support at the inner end next the building being only about an inch in width of a perishable wooden stringer, and failing to inspect them for all these years, to ascertain their condition, constituted a state of facts that abundantly justified the court in finding that defendant was guilty of negligence. The defendant, however, sought to escape liability by attempting to show that he had rented the premises to certain tenants, and that they, and not he, were responsible for the maintenance of this hatchway and cover; and the refusal of the court to make a finding as to the possession and occupancy of the premises by these tenants before and at the time of the accident is assigned as error. Without considering the points that the pleadings raised no such issue, and that according

to the findings of the court this cover to the hatchway was already in an unsafe condition before the date of the lease to the tenants, it is enough to say that there was not a particle of evidence that the lease included the cellar or the hatchway.

There is no merit in defendant's seventh assignment of error. Of course, the city was not liable to Schinzel for his attorneys' fees as such, but the $150 in this case was paid to his attorneys as part of the amount which the city had agreed with him to pay in settlement of his claim against it for damages. In legal effect, it was paid to Schinzel, and as long as it was paid for his benefit, and in settlement of his claim against the city, it was wholly immaterial to whom the money was actually paid over; the aggregate amount paid out in all being within the amount for which the city and the defendant were liable to him.

As we do not discover any error in the record, the judgment appealed from must be affirmed.

V. Drains and Sewers [11]

TATE v. CITY OF ST. PAUL.

(Supreme Court of Minnesota, 1894. 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501.)

Action by William E. Tate against the city of St. Paul. Judgment was ordered for plaintiff, and defendant appeals.

GILFILLAN, C. J. The action is to recover damages arising from a sewer laid by defendant, and with which plaintiff had connected, as he had a right to do, setting the water in it back so that it flooded plaintiff's basements. The defect alleged in the sewer was that it was of insufficient capacity to carry off the water brought into it. The defect appears to have existed in the original plan for sewering that part of the city; that is, the city, in determining upon a system of sewers, determined upon the sizes required for the main sewer and for the lateral sewers running into it, and the size determined on for the former proved too small.

The rule is uniformly conceded that for injuries wholly incidental to and consequential upon the exercise by a municipal corporation of the legislative or discretionary powers intrusted to it (as distinguished from its ministerial acts) no action will lie against it. Instances of the application of that rule are furnished by Lee v. City of Minneapolis, 22 Minn. 13, where the power exercised was establishing the grade of a street under the charter, and Alden v. City of Minneapolis,

[11] For discussion of principles, see Cooley, Mun. Corp. § 122.

24 Minn. 254, where the city had established a system of grades for streets and sidewalks and drains, gutters, catch-basins, and sewers, and had constructed the streets, sidewalks, drains, and gutters, and partially completed the sewers. The complaint was that the sewers, drains, gutters, and catch-basins were not sufficient to carry off the surface water falling in rains upon the streets, so that it flowed from the streets upon plaintiff's lot. The line between legislative acts and ministerial acts of a municipal corporation is not very clearly marked by the decisions, nor is it necessary to attempt to trace it in this case. Some of the earlier cases do not clearly recognize the distinction between injuries incidental to the exercise of municipal legislative functions, and direct and positive wrongs—such, for instance, as trespass—caused by it. The later and better authorities, however, recognize the distinction, and, while adhering to the rule that for the former no action will lie, hold that for the latter the party may recover. The distinction is apparent, though it is not clearly discussed in either of the cases, of O'Brien v. City of St. Paul, 18 Minn. 176 (Gil. 163,) and 25 Minn. 331, 33 Am. Rep. 470, Kobs v. City of Minneapolis, 22 Minn. 159, and the Lee and Alden Cases, above cited.

To determine when and upon what plan a public improvement shall be made is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is, in its nature, legislative. And, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground of action; as, if, in grading streets to the authorized grades, the plan of the grading is inadequate to drain a lot of the surface water, or even if it make it more difficult and expensive for the owner to drain it, or make access to the lot more difficult, that is a result incidental to the improvement. But for a direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise, it would be taking private property for public use without compensation. Thus, if, in cutting a street down a grade, the soil of an abutting lot is precipitated into the cut, or if, in filling up to grade, the slope of the embankment is made to rest on private property, that is a direct invasion of property rights which cannot be justified, even though the plan adopted contemplates, or will necessarily produce, the result. Judge Dillon, in his work on Municipal Corporations, (4th Ed., §§ 1047–1051,) approves the rule, laid down in more recent decisions by some of our ablest courts, that if a sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of private property, as by collecting and throwing upon it, to its damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. Conspicuous for their ability, among the cases referred to by him, are Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552, and Seifert v. City of

Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664, each, the former especially, a very interesting case. See, also, Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Lehn v. City and County of San Francisco, 66 Cal. 76, 4 Pac. 965; Weis v. City of Madison, 75 Ind. 241, 39 Am. Rep. 135. It is impossible to answer the reasoning of these cases, especially where the injury complained of constitutes a taking. That making one's premises a place of deposit for the surplus waters in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made, see Weaver v. Boom Co., 28 Minn. 534, 11 N. W. 114.

The court below instructed the jury "that where a public work, for instance a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent measures, the corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil." This is within the rule stated in Dillon and the cases cited, and, as it gives the corporation an opportunity to correct or obviate the error in the original plan before liability, we do not hesitate to approve it. This is as far as we need go in this case. The evidence was such as to justify a verdict for plaintiff under that charge of the court. Order affirmed.

DEBTS, FUNDS, EXPENSES AND ADMINISTRATION

I. Limitation of Indebtedness [1]

CITY OF LA PORTE v. GAMEWELL FIRE-ALARM TELEGRAPH CO.

(Supreme Court of Indiana, 1896. 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359.)

Action by the Gamewell Fire-Alarm Telegraph Company against the city of La Porte to recover the contract price of a fire-alarm system furnished by plaintiff to defendant. From a judgment in favor of plaintiff, defendant appeals.

MONKS, J.[2] * * * It appears from the special finding that on August 5, 1890, appellee entered into a contract with appellant to furnish and put in complete working order appellee's system of fire alarm, for the sum of $3,500, to be paid May 1, 1891. The contract provided that, when said system was completed, appellant should accept the same, and deliver to appellee a certificate to that effect. The work was completed and accepted by appellant December 18, 1890. At the time of entering into the contract, and until May 1, 1891, appellant was indebted, not including appellee's claim, over $5,000 more than 2 per cent. on the assessed value of its taxable property. At the date of said contract, $2,639.80 was on hand in the city treasury. When the work was completed and accepted, there was on hand in the general fund $359. On May 1, 1891, there was $10,328.80 in the city treasury belonging to the general fund collected from the duplicate of 1890. On June 30, 1890, the common council of appellant, by resolution duly passed, ordered that a tax of $1.05 on each $100 of valuation of taxable property be levied,—74 cents for general purposes, and 31 cents for the purpose of paying $5,000 of the city debt and the interest on the city debt. The amount of said levy was $31,285. No specific levy was ever made for the purpose of meeting any indebtedness to appellee. On June 22, 1891, the common council passed a resolution declaring "that $3,532.68 be set aside out of the general fund for the purpose of paying the order drawn in favor of the Gamewell Fire-Alarm Telegraph Company, which was ordered drawn May 25, 1891, by the common council, and which the mayor refused to sign."

Appellant earnestly insists that, by the contract sued upon, appellant became indebted to appellee, and that the same was void, un-

[1] For discussion of principles, see Cooley, Mun. Corp. § 126.

[2] Part of the opinion is omitted.

der the provisions of article 13 of the constitution, for the reason that appellant was already indebted in excess of the amount allowed by said article. Article 13 of the constitution adopted in 1881 is as follows: "No political or municipal corporation in this state shall ever become indebted in any manner or for any purpose, to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: provided, that in time of war, foreign invasion or other great public calamity, on petition of a majority of the property owners, in number and value within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense to such an amount as may be required in such petition." This clause in our constitution is, in legal effect, the same as that of Iowa, and was, no doubt, taken from the constitution of that state. It is a familiar rule that, where a clause is taken from the constitution or statute of another state, it will be deemed to have the meaning given it by the courts of that state. Under this provision, every indebtedness incurred "in any manner, or for any purpose," is within the prohibition. City of Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628; Scott v. City of Davenport, 34 Iowa, 208; Grant v. City of Davenport, 36 Iowa, 396, 401; French v. City of Burlington, 42 Iowa, 614; Anderson v. Insurance Co., 88 Iowa, 579, 55 N. W. 348; Brown v. City of Corry, 175 Pa. 528, 34 Atl. 854; Lake Co. v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. Ed. 1044; Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; note to Beard v. City of Hopkinsville (Ky.) 23 L. R. A. 402–408; s. c. 95 Ky. 239, 24 S. W. 872; note to same case, 44 Am. St. Rep. 229, 243.

The controlling question in this case is, do the facts found show an indebtedness of appellant within the inhibition imposed by the foregoing article of the constitution? A debt, in its general sense, is a specific sum of money, which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. State v. Hawes, 112 Ind. 323, 14 N. E. 87; City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647. It is the rule in this state that when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of a debt. Crowder v. Town of Sullivan, supra, and

authorities cited; City of Valparaiso v. Gardner, supra, and cases cited; Foland v. Town of Frankton, 142 Ind. 546, 41 N. E. 1031, and authorities cited; Seward v. Town of Liberty, 142 Ind. 551, 554, 42 N. E. 39; 1 Dill. Mun. Corp. (4th Ed.) § 136a; Wade v. Oakmont Borough, 165 Pa. 479, 30 Atl. 959; Brown v. City of Corry, 175 Pa. 528, 34 Atl. 854. If the city can pay this indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and there is a violation of the constitution. City of Valparaiso v. Gardner, supra; Dill. Mun. Corp. §§ 136, 136a; Appeal of City of Erie, 91 Pa. 399. It is also the law that items of expense essential to the maintenance of corporate existence, such as light, water, labor, and the like, constitute current expense, payable out of current revenues. Foland v. Town of Frankton, 142 Ind. 550, 41 N. E. 1031. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred; but a debt cannot be made beyond the constitutional limit, even for the current expenses mentioned, no matter how urgent. Sackett v. City of New Albany, 88 Ind. 473, 45 Am. Rep. 467; City of Valparaiso v. Gardner, supra.

It is clear, therefore, that whenever a city whose indebtedness exceeds the constitutional limit does not have money on hand arising from current revenues to meet its debts, of whatever character, as they come into existence, whether for light, water, labor, or any other expense, the city has become indebted, and the constitution is violated. It is not sufficient, however, merely to have on hand enough money to pay each indebtedness as it comes into existence; but the same must be paid as it comes into existence, or there must be enough money on hand to pay all of such indebtedness outstanding, or there is an indebtedness created, and the constitution is thereby violated. If, to avoid the constitutional inhibition, it is only necessary to have on hand sufficient money to pay an indebtedness when it comes into existence, without paying or keeping on hand enough money to pay it, there would be no restraint upon the power of a municipality to become indebted. Obligations payable out of a particular fund, and for which the fund only, and not the municipality, is liable, are not within the inhibition. Quill v. Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; Strieb v. Cox, 111 Ind. 209, 12 N. E. 481; Board, etc., v. Hill, 115 Ind. 310, 16 N. E. 156; City of New Albany v. McCulloch, 127 Ind. 500, 505, 26 N. E. 1074; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; City of Galveston v. Heard, 54 Tex. 420; Davis v. Des Moines, 71 Iowa, 500, 32 N. W. 470; Baker v. City of Seattle, 2 Wash. 576, 27 Pac. 462; An-

tin v. City of Seattle, 2 Wash. 673, 27 Pac. 557. The same rule applies to agreements to accept certificates of assessments in full satisfaction. Davis v. Des Moines, supra. But anything that renders the city liable brings the indebtedness within the restriction. Fowler v. City of Superior, 85 Wis. 411, 54 N. W. 800.

It is held in some states, under constitutional provisions substantially the same as ours, that a municipality which has reached its limit may anticipate the collection of the revenue appropriated to its use, by drawing warrants against taxes levied, but not collected; thus substantially appropriating and assigning the amount drawn to the holder of the warrant. French v. City of Burlington, supra; Law v. People, 87 Ill. 385; City of Springfield v. Edwards, 84 Ill. 626; City of East St. Louis v. Flannigan, 26 Ill. App. 449; Koppikus v. State Capitol Com'rs, 16 Cal. 248. But, in order to escape the inhibition of the constitution, the tax must not only have been levied, but the warrant must be drawn, payable out of the particular fund, and be such, in legal effect, as to discharge the municipality from all liability. City of Springfield v. Edwards, supra; Law v. People, supra; Fuller v. Chicago, 89 Ill. 282; People v. May, 9 Colo. 404, 12 Pac. 838. In City of Valparaiso v. Gardner this court said: "If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness. * * * So, if the consideration of the contract is received at once, instead of being yielded at intervals, then it might be said that there was a debt; but where nothing is owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary expense of the municipality, there will be no debt, if, when the thing is done or furnished, there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim, without encroaching upon other funds."

Conceding, without deciding, that a fire-alarm system is a necessary or ordinary annual expense of a municipality, and essential to its existence, yet appellee's claim is within the inhibition of the constitution. In this case it is not material whether the indebtedness came into existence on December 18, 1890, when appellee completed the work, and the same was accepted by appellant, or at the date of the contract, August 5, 1890. It is clear that the indebtedness came into existence December 18th, when the work was completed and accepted, if not before. There was not sufficient cash in the city treasury to pay said indebtedness at that time, and the constitutional provision was violated. But it is urged that the debt was not payable until May 1, 1891, and that there was sufficient cash in the treasury to pay the same at that time. The rule is that the cash must be in the treasury to pay the same when the debt comes into existence, not when it becomes due (City of Valparaiso v. Gardner, 97 Ind. 8, 49 Am. Rep. 416); otherwise, the city could issue bonds for borrowed money or other existing indebtedness, or become so indebted in other

ways, far in excess of the constitutional limit, and by making the same payable in annual installments, and each year levying and collecting sufficient taxes to pay the same, avoid the constitutional inhibition. * * * Reversed.

II. Borrowing Money[3]

ALLEN v. CITY OF LA FAYETTE.

(Supreme Court of Alabama, 1890. 89 Ala. 641, 8 South. 30, 9 L. R. A. 497.)

The bill in this case was filed by the appellants against the appellee, and sought to enjoin the payment of warrants by the town treasurer. Upon consideration, the chancellor overruled a motion to dismiss the bill, and decreed that the injunction be dissolved. The complainants prosecute this appeal, and assign this decree of the chancellor as error.

McCLELLAN, J.[4] The intendant and councilmen of the town of La Fayette on or soon after March 18, 1889, purchased from one Schuessler a brick college building and grounds, situate in La Fayette, and took a quitclaim deed of the property to themselves, the said intendant and councilmen. Only a small part of the purchase money was paid out of the funds of the town, and the balance, about $1,300, was borrowed from Mrs. S. A. Frederick by the town authorities, and paid to Schuessler. For the repayment of this loan, warrants were regularly drawn against the treasury of the town for the sums of $659.40 payable January 1, 1890, and $667.72, payable March 1, 1890, respectively, and delivered to Mrs. Frederick. The present bill is exhibited by resident property owners and tax-payers of the town of La Fayette, and seeks to enjoin the payment of said warrants on the grounds (1) that the municipality of La Fayette was without authority to purchase the school-house or college building, and that the money was loaned by Mrs. Frederick with full knowledge that it was to be used in that behalf, and warrants taken by her with full knowledge that it had been so applied; and (2) that the intendant and councilmen of the town of La Fayette had no power under its charter to borrow money for any purpose.

2. Assuming that the theory of the bill as to the powers of the municipality, and as to the character of the transaction between the intendant and councilmen on the one hand, and Mrs. Frederick on the other, is sound, the right of these complainants to maintain the suit is, as a general proposition, fully supported by the authorities, and not seriously controverted by the appellees. 2 High, Inj. § 1237 et

[3] For discussion of principles, see Cooley, Mun. Corp. § 127.

[4] The statement of facts is rewritten and part of the opinion is omitted.

seq.; 2 Dill. Mun. Corp. § 914 et seq.; 1 Pom. Eq. Jur. §§ 258–260, 270, 273; 10 Amer. & Eng. Enc. Law, 963.

3. The first ground upon which the prayer for relief is based is in our opinion untenable. The charter of La Fayette empowers the municipal authorities to purchase and hold, or dispose of, for the benefit of the town, real, personal, and mixed property, to the value of $15,000. Power is also conferred to maintain public schools within the town; and to this end, as well as to defray the ordinary expenses of municipal government, the corporate authorities may levy an annual tax not exceeding one-half of 1 per cent. on the assessed value of the property thereof. Acts 1880–81, p. 420; Acts 1888–89, p. 1061. We do not doubt that under these grants of power the municipality of La Fayette was fully authorized to purchase and hold a school-house such as the present bill alleges to have been purchased by the intendant and councilmen of the town. 2 Dill. Mun. Corp. § 561 et seq.

4. The taxing power is conferred on municipal corporations, of course, for the purpose of providing means with which to meet their current expenses incurred in the performance of the duties resting on them as governmental agencies; and it may ordinarily be assumed the means thus provided are adequate to the ends in view. Yet, in the nature of things, it is impracticable, if not indeed impossible, for the powers of such, or any, corporations to be exercised without incurring liabilities beyond the funds immediately in hand, and thus anticipating corporate revenues. In recognition of a necessity of this kind, it may be said that the law has come to be well settled to the effect that municipal corporations may create debts in the accomplishment of any object clearly within their powers, and reasonably essential to the attainment of their charter purposes. Custom of long standing and universal adoption, if not express law, has sanctioned the evidencing of such debts by the drawing of warrants therefor on disbursing officers in favor of creditors.

Applying these principles to the exigencies which presented themselves to the intendant and councilmen of La Fayette, when, in their judgment, the good of the town demanded the purchase of a school-house, we do not question that it was competent for them to buy the property which they did buy on a credit, and thus incur a debt to the extent of the price they were to pay, the value of the property as measured by the price not being in excess, when added to the value of other property already owned by the corporation, of $15,000, and the property being of a class and character appropriate to corporate uses in the discharge of legitimate municipal functions. Nor do we doubt that, for a debt thus created, warrants might legally have been drawn on the town treasury, payable at stated dates to the vendor. Had this been done, these evidences of the indebtedness might have been sold and transferred by the vendor to Mrs. Frederick, and she thereby subrogated to all the rights of the first holder.

The case alleged by the bill and admitted in the answers differs from the case hypothetically stated in this, and only in this, in substance and effect, that Mrs. Frederick, instead of paying the money to the town creditor, paid it to the town itself, and the latter immediately, and as upon prearrangement known to all parties, paid to Schuessler, and in consideration thereof received a conveyance of the college building. Slight as the difference appears on its face to be, it has, in our opinion, the important operation of converting the transaction into a loan of money by Mrs. Frederick to the corporation, and left in her hands a contract for its repayment which, as such, she cannot enforce, for the reason that this contract is ultra vires the town of La Fayette. Its charter nowhere expressly confers power on the corporate authorities to borrow money for any purpose, or under any circumstances. And whatever may be the decisions of other courts, and however variant may be the judicial opinion in other jurisdictions, on the point, the doctrine is thoroughly well settled in Alabama that, the power to borrow money is not incident to municipal corporations, and that, if it exists in any instance, it must be by the force of express legislative grant, or at least by force of legislative investment of power coupled with the imposition of duties which are incapable of exercise and performance without the borrowing of money. We need not enter upon a discussion of the reasons which underlie this doctrine. They are many and cogent, and most clearly stated by Judge Dillon, Justice Bradley, and in former adjudications of this court which establish the proposition. 1 Dill. Mun. Corp. §§ 117, 126; Mayor v. Ray, 19 Wall. 475, 22 L. Ed. 164; Simpson v. Lauderdale Co., 56 Ala. 64; Wetumpka v. Wharf Co., 63 Ala. 611.

5. The intendant and councilmen of La Fayette had no authority, therefore, to borrow this money, nor had they any authority to draw the warrants which were drawn and delivered to Mrs. Frederick. They were the trustees for the inhabitants of the town. Their action in excess of the power with which the trust relation clothed them, and in violation of the duties they owed to their cestuis que trustent, the present complainants, among others, was of no manner of efficacy in fixing a liability on those for whom they thus usurped the power of acting. The warrants in the hands of Mrs. Frederick are as if they were not, and had never been. Neither the municipality of La Fayette, nor any of its officers or agents, is under any obligation, legal, equitable, or moral, to pay those warrants, or to fulfill the contract out of which they sprung. But back of that contract, and back of those warrants, there is, on the facts presented by the bill and accentuated by the answers, not only a moral but a legal liability resting on the municipality of La Fayette, and on its officers, to repay the money which came from Mrs. Frederick, and has been used by the corporation for authorized corporate purposes. In other words, the town of La Fayette is liable as upon an implied assumpsit, not under,

but wholly apart from, the unauthorized contract, and not for the amount its officers borrowed from Mrs. Frederick, but for the amount of her money which they received and applied to the purchase of a house which the charter authorized them to buy and the town to hold, which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties, and which the use of her funds had enabled the corporation to acquire and devote to its legitimate purposes.

The authorities are not uniform to this proposition. It is however believed to be eminently sound in principle, and has the support of some of the most distinguished law-writers, and of courts of marked ability and learning. It is thus formulated by Mr. Brice with general reference to both public and private corporations: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessaries of the corporation, are considered in chancery [and, also, it would seem to follow, in the equitable action for money had and received at law] as creditors of the corporation to the extent the loan has been expended," and, in support of the doctrine thus stated, he cites many cases in which corporations without any authority, expressed or implied, to that end had borrowed money, and been holden, although the contract itself was wholly void, to account for so much of it as had been expended in furthering the legitimate objects of the concern. Green's Brice, Ultra Vires, 724 et seq. And in this connection the American editor of the work cited observes: "In the United States the defense of ultra vires, interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defense; in others, the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases the doctrine of estoppel in pais has been applied to exclude the defense." And many American cases are cited which support one or the other of the positions stated as being taken by the courts of this country in respect to private corporations.

In regard to municipal corporations, the opinion of Judge Dillon manifestly is in line with the position we have taken. We believe this to be a correct formulation of his view of the law on the point under consideration, as gathered from his inestimable work on Municipal Corporations. That municipal corporations are liable to action of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are malum in se, or violative of public policy. 1 Dill. Mun. Corp. §§ 126, 132, 133, 459–465; 2 Dill. Mun. Corp. §§ 936–938. Thus in a note to section 126 it is said: "If money is improperly borrowed

in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects, the municipality may then * * * be liable in a proper action or suit; but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds." And under section 935 it is said that, "where the corporation receives and retains the consideration of an ultra vires contract, it may be liable upon an implied assumpsit in respect to such consideration." And the opinion of Chief Justice Field in a case where the subject underwent very thorough examination is quoted approvingly to the effect that "the doctrine of implied municipal liability applies to cases where money or property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise." Argenti v. San Francisco, 16 Cal. 255. Justice Miller, speaking of cases where corporations have been sued on contracts which they have successfully resisted because they were ultra vires, observes: "But even in this class of cases, the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money, specifically, or as money had and received to plaintiff's use." Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176. To a like effect are the following cases: Pimental v. San Francisco, 21 Cal. 362; Clark v. Saline Co., 9 Neb. 516, 4 N. W. 246; Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. * * *

We find no adjudication in Alabama irreconcilable with the doctrine of the foregoing authorities. There are indeed cases which hold that recovery cannot be had upon the ultra vires contract of borrowing. Such was the case of Simpson v. Lauderdale Co. The gravamen of that action was that the county had agreed to pay a certain sum of money, and that this sum had been loaned to the county to pay for building a bridge. It was not sought to charge the county for that it had received plaintiff's money and actually used it for a legitimate county purpose. No question arose or was discussed in that case involving the implied liability of the county because of the advantage which had accrued to it and all its inhabitants from the expenditure of the plaintiff's money in a structure which the law authorized it to

erect. It was not even shown what became of the money, further than that it was borrowed for the purpose of being so expended. And a right of recovery was denied because it was rested upon and involved the assumption of the validity of an undertaking which the county was without power to enter into. We do not understand the opinion to go further than this; the matter decided certainly does not; and to this extent it is in perfect accord with the position we have taken. The same view may be taken of the case of Wetumpka v. Wharf Co., supra, supported by the further consideration that the uses to which the borrowed money was put in that case were themselves ultra vires, and not only was the contract without authority and void, but there was a misappropriation of the fund, accomplished or contemplated, so as to preclude the implication of corporate liability from corporate benefits received. * * *

Our conclusion is that the weight of authority is in favor of the implied liability of municipal corporations, under the facts disclosed in this record. We cannot perceive that the doctrine is open to objection on the ground of its supposed evil tendencies and consequences. It is shorn of all perilous possibilities by the limitations which hedge it about. It cannot obtain where the charter, or other statute operating in the premises, contains a prohibition of the power to borrow money, since a promise cannot be implied in the face of express law, but only in cases where, as in this one, there is merely a defect of power. 1 Dill. Mun. Corp. § 461. It involves no danger of the municipality being charged with moneys which have been appropriated by its officers to their own use, or even to the use of the corporation, except in the manner, to the extent, and for the purposes authorized by the charter, as in either case the implication will not arise, and corporate liability will not attach. None of the evils which are justly supposed to result from the power to borrow money, which are not also attendant upon the capacity to incur debts, and which therefore have led to a denial of the former power unless expressly or by necessary intendment conferred, while the latter is admitted as incident to ordinary municipal functions, can possibly supervene where the money which has been borrowed has also been honestly devoted to expenditures for which the corporate authorities might have incurred debt. And, to declare liability in the one instance, and deny it in the other, on the ground of evils which pertain alike to both, would be an anomaly to which we cannot subscribe. Indeed, we apprehend that the power to create debts may be productive of more evils in municipal government than could, in the nature of things, result from the doctrine we are considering, when would-be lenders of money come to understand that the return of their proverbially timid capital depends not upon the contracts they make, but on the faithful application of the loan to certain specific objects, by persons over whom they have no control.

From every point of view, therefore, we feel safe in affirming that, under the case presented by the bill and answer,—there really being no dispute about the facts in this regard,—Mrs. Frederick has a valid demand against the town of La Fayette for the amount of money advanced by her, not because the corporate authorities agreed to repay it to her, but because they have legitimately used it for the benefit of the town, in a way and to an end fully authorized by its charter. The warrants she holds are not enforceable as such, yet they truly represent the amount of her claim, and in the payment of that amount the corporate authorities would do no more than equity and justice require of them. * * * Affirmed.

III. Municipal Bonds—Power to Issue [5]

MERRILL v. TOWN OF MONTICELLO.

(Supreme Court of the United States, 1891. 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069.)

In error to the Circuit Court of the United States for the District of Indiana.

This was an action at law by Abner L. Merrill, a citizen of Massachusetts, against the town of Monticello, in the state of Indiana, upon certain bonds and coupons issued by the town, and purchased by the plaintiff in open market. There was judgment for defendant and plaintiff brings error.

Mr. Justice LAMAR.[6] The decisive question presented by the record in this case is, did the town of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought? Chancellor Kent, in his Commentaries, (volume 2, pp. 298, 299,) referring to the strictness with which corporate powers are construed, irrespective of the distinction between public and private corporations, uses the following language: "The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The supreme court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the state courts. * * * As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just

[5] For discussion of principles, see Cooley, Mun. Corp. §§ 128, 129.

[6] The statement of facts is abridged and part of the opinion is omitted.

and proper that they should be obliged strictly to show their authority for the business they assume, and be confined, in their operations, to the mode and manner and subject-matter prescribed."

Judge Dillon, in his work on Municipal Corporations, (section 89,) says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

In Hopper v. Covington, 118 U. S. 148, 151, 6 Sup. Ct. 1025, 30 L. Ed. 190, this court, in passing upon the power of incorporated towns in Indiana, under laws which we will have to consider and pass upon in this case, said, Mr. Justice Gray delivering the opinion: "When the law confers no authority to issue the bonds in question the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040; East Oakland v. Skinner, 94 U. S. 255, 24 L. Ed. 125; Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Hayes v. Holly Springs, 114 U. S. 120, 5 Sup. Ct. 785, 29 L. Ed. 81; Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026."

In Gause v. Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276, the court, in an able discussion of the inherent and incidental authority of municipal corporations, holds that whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter, and the legislation of the state applicable to it.

In order to determine the question before us, recourse must be had to the statutory enactments, applicable to the subject, that were in force at the time the bonds in this suit were issued, in May, 1878. These enactments are contained in sections 3333, 3342, 3344, 3345, 4488, and 4489 of the Revised Statutes of Indiana of 1881. Section 3333 is a section of the act of 1852 for the incorporation of towns in that state, and contains the usual grant of municipal powers. Section 3342, which was also section 27 of the same act of 1852, provides as follows: "No incorporated town, under this act, shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. * * *"

The other sections contain the provisions of certain statutes passed in 1867, 1869, and 1873. It is only necessary to quote here sections

4488 and 4489, as they embody the provision of the act of 1873, which is itself the statute of 1869 rewritten in order to extend to other purposes not material to this inquiry.

"Sec. 4488. Any city or incorporated town in this state which shall, by the action of its school trustees, have purchased any ground and building or buildings; or may hereafter purchase any ground and building or buildings; or has commenced, or may hereafter commence, the erection of any building or buildings for school purposes; or which shall have, by its school trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings; or such trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt,—may, * * * on the passage of an ordinance authorizing the same by the common council of said city, or the board of trustees of such town, issue the bonds of such city or town to an amount not exceeding, in the aggregate, fifty thousand dollars, in denominations not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in the bonds (the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided) to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt. Such common council or board of trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place, and for the best price that can be obtained therefor in cash: provided, that such bonds shall not be sold at a price less than ninety-four cents on the dollar. * * *"

We have given these sections in full to show the entire legislation of the state in 1878 upon the subject of the power of towns to borrow money, contract loans, incur debts, and issue bonds, so that it may be the more clearly determined whether it anywhere expressly confers upon incorporated towns of the state the general power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of bona fide purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker. In our opinion no such express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness. Obviously, it cannot be found in sections 4488 and 4489, for they relate specifically and exclusively to bonds for school buildings, school grounds, and school debts, and prescribe the mode by which bonds may be issued by towns for those specified objects,—a mode confessedly not followed, or even attempted to be followed, in issuing the bonds in this suit. We are confirmed in this conclusion by the view taken in Hopper v. Covington, su-

pra: "The averment that the defendant is a municipal corporation under the laws of Indiana, 'with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper,' if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice."

The laws of Indiana referred to are those we are now considering. The court also says: "The general statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only." But the bonds in suit were not issued for either of the purposes named, but to retire and pay off the bonds of 1869. The town had no power to pay off those bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year "sufficient to pay the annual interest, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal." When bonds are once issued for a lawful purpose, the town is functus officio as to that matter. To argue that the old bonds are a debt for school purposes, which may be liquidated by new bonds, is a refinement of construction which the sound sense of the law rejects.

The plaintiff in error relies mainly upon the ground that the authority in question arises, by necessary implication, from the power to make certain expenditures, from the character of the objects to be accomplished by those authorized expenditures, from the necessity of providing the means for paying a previous indebtedness lawfully incurred in such expenditures, and from other powers expressly granted. The line of his counsel's argument, and that of the district judge to whose opinion our attention has been especially called, is this: While section 3342 (the same as section 27 in the act of May, 1852) is not in itself a substantive grant of power, it clearly evinces the legislative intent and understanding that the right to borrow money or otherwise incur any debt or liability might be implied as incidental to the express power given in that or any subsequent act containing not inconsistent provisions, and includes a case like this, where the power is necessary to prevent a default of payment of a previous debt which it was authorized to create. It is insisted, further, that it is the settled doctrine in Indiana that corporations take, by implication, all the reasonable modes of executing their express or substantive powers which a natural person may adopt; and that, in the absence of positive restrictions, a corporation has the power to borrow money as an incident to such power.

Section 119, Dill. Mun. Corp., lays down the Indiana law on this subject substantially as is contended for by the plaintiff in error. That section is as follows: "In Indiana, the doctrine is that corporations, along with the express and substantive powers conferred by

their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the express powers." A large number of cases from the supreme court of Indiana are cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money, or contract a loan, under the conditions and in the manner expressly prescribed, cannot be controverted.

But this only brings us back to the question, does the implied power to borrow money or contract a loan carry with it a further implication of power to issue funding negotiable bonds for that amount, and sell them in open market, as commercial paper? Let us see. Section 3342 is unquestionably a limitation upon the power to borrow money. Its very language is that of mandatory negation: "No incorporated town shall have the power to borrow money, or incur any debt," unless certain conditions precedent are complied with. The conditions which the statute prescribes, the statute means to be performed. There can be no legal borrowing, unless the statute is strictly followed. What does it prescribe? That there must be first a petition to the town trustees, which shall be signed by the citizen owners of at least five-eighths of the taxable property of the town, whose signatures shall be verified by an affidavit to the petition. The prayer of the petition is required to be that the board of trustees shall contract such debt or loan. The board could not depart, in its action, from this legally required prayer of the petition without transcending its authority, and acting ultra vires. But the board did depart from the prayer, for it did not borrow money nor contract a loan; but it ordained, in so many words, that the town issue bonds for negotiation and sale at not less than 94 cents on the dollar. * * *

It is admitted that the power to borrow money or to incur indebtedness carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a bona fide holder for value, from equitable defenses. The plaintiff in error contends that there is no legal or substantial difference between the two, that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a "sale," is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name.

We think the case of Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251, is directly and absolutely conclusive against the position of the plaintiff in error on this point. It was an action upon coupons of certain bonds issued by the police jury of Tensas parish, La., the validity of which the defendant denied, upon the ground that they were issued without the authority of any law of that state. It appeared that the police jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said police jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz., whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration, in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of bona fide holders, for the purpose of raising money or funding a previous indebtedness.

The opinion of the court, delivered by Mr. Justice Bradley, clearly illustrated the fundamental distinction between issuing bonds merely as evidence of a debt or loan and issuing bonds for negotiation and sale generally, with respect to the powers of a municipal corporation. It said: "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement, or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day, and transferable from hand to hand. * * *. The power to issue such paper has been the means, in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of bona fide holders. * * * It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought

not to be implied from the mere authority to make such improvements." * * *

The same doctrine is presented most forcibly in the case of Mayor v. Ray, 19 Wall. 468, 22 L. Ed. 164. In Claiborne Co. v. Brooks, 111 U. S. 400, 406, 4 Sup. Ct. 489, 28 L. Ed. 470, it was held that the statutes of Tennessee, which conferred upon counties in that state the power to erect a court-house, jail, and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. * * *

In Hill v. Memphis, 134 U. S. 198, 203, 10 Sup. Ct. 562, 33 L. Ed. 887, it was held that the power conferred by statute on municipal corporations to subscribe for stock in a railway corporation did not include the power to create a debt and issue negotiable bonds in order to pay for that subscription. In delivering the opinion of the court, Mr. Justice Field said: "Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company, or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such papers in the hands of innocent parties for value cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidence of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." All of the cases we have cited above were referred to in the opinion in that case as sustaining the doctrine there in laid down.

The logical result of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid. It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is that the town had the power to contract a loan under certain specified restric-

tions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations. * * *

In the case before us the power in question is not, in our opinion, indispensable to the exercise of the express or implied powers conferred upon the town by law. The utmost that can be said is that it was deemed more convenient or expedient to issue the bonds in that form than in the mode prescribed.

We think that the fact that the legislature of the state of Indiana by the acts of 1867, 1869, and 1873, above referred to, expressly authorized towns in the same class as the defendant in error to issue bonds for certain specified purposes, under proper safeguards and limitations, is indicative of the legislative understanding that, without some such express statutory provisions, no power existed in the town to issue negotiable bonds, and sell them in open market.

The same may be said of the act of the legislature of that state which took effect August 24, 1879, expressly conferring upon the towns in that state power to fund their indebtedness by issuing bonds and negotiating them for that purpose, under certain specified terms, restrictions, and limitations.

We are not unmindful that in several of the cases in the supreme court of Indiana, cited by counsel for plaintiff in error, there may be found abstract propositions susceptible of a construction in support of the position he seeks to maintain; but we think this case is distinguishable from them all in essential features, which except it from those general propositions, and leave the conclusion which we have reached in harmony with them.

It is contended that the bonds sued on were issued practically for the purpose of taking the place of the prior bonds, outstanding and unpaid, which represented a debt for the erection of a school building, and were therefore authorized by section 4488. This position is untenable. It cannot be reasonably contended that the bonds were issued under any of the sections relating to the negotiation and sale of bonds for school purposes. It is not even pretended that they were issued in accordance with the clearly-defined conditions and restrictions imposed by those sections.

Nor do we think the fact that the town actually received a portion of the money arising from the sale of the so-called bonds (or, in legal contemplation, perhaps all of it, as it was paid to the agent of the town) estops the corporation from pleading a want of author-

ity in the municipality to issue the instruments sued on. The original act of issuing the bonds for sale was not only unauthorized by law, but in disregard of its requirements, and no subsequent act of the town trustees could make it valid. Whether it could be a circumstance in favor of the equitable right of the holders of the bonds to recover from the municipality the money which they represent is a question not here for consideration.

The suit was upon the bonds themselves, and for the reasons above stated we hold that there can be no recovery upon them. Judgment affirmed.

DODGE v. CITY OF MEMPHIS.

(Circuit Court of the United States, E. D. Missouri, 1892. 51 Fed. 165.)

At Law. Action by James B. Dodge against the city of Memphis, Mo., on certain municipal bonds. Heard on demurrer to plea.

THAYER, District Judge. The petition contains three counts. The first count alleges that in February, 1871, the town of Memphis, Scotland county, Mo., subscribed for $30,000 of the capital stock of the Missouri, Iowa & Nebraska Railway Company, pursuant to power conferred by an act of the general assembly of Missouri, approved February 9, 1857, to incorporate the Alexandria & Bloomfield Railroad Company; that such subscription was authorized by a majority vote of the people of the town of Memphis, at an election held for that purpose; that as an evidence of such subscription coupon bonds to the amount of $30,000 were issued and delivered by the town, which were to run for 20 years, and which matured on March 1, 1891. It is further averred that the town of Memphis received the stock in question, but subsequently sold it, and that for some years it paid the interest on its bonds; that it also appointed an agent to represent the town at meetings of the stockholders of the railway company. The petition then sets out one of the bonds in hæc verba, which appears to be a negotiable bond, in the ordinary form, such as are usually issued by municipal corporations; and avers that the plaintiff is the holder of 22 of such bonds, (giving their numbers,) and demands judgment for the amount due on the subscription as shown by the bonds, together with interest from March 1, 1891.

The theory of the plaintiff's counsel seems to be that the first count of the petition is a suit on the bonds, treating them as nonnegotiable instruments; that the bond evidences the contract of subscription, and that the plaintiff is entitled to sue on the same, ignoring their negotiable quality precisely as if they were an ordinary nonnegotiable contract, which the town was authorized to make and had made. That the town of Memphis had no authority to issue negotiable bonds in payment for the stock subscription is conceded. Hill v.

Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887. To the first count of the petition the defendant interposes several different pleas, including a plea of the statute of limitations, and to the latter plea plaintiff demurs.

It may be conceded that if the first count of the petition is properly founded on the bonds, calling them either bonds or the contract of subscription, then the statute of limitations is not well pleaded, because such bonds did not mature until March 1, 1891, and neither the 5, 10, nor 20 years' bar of the statute is applicable. But, on the other hand, if a suit cannot be maintained on the bonds according to plaintiff's contention, then the first count of his declaration is bad, and the demurrer to the plea is not tenable for that reason. I have looked through all of the federal cases cited by plaintiff's attorney in support of his contention that where negotiable bonds are issued by a municipal corporation without authority of law, and are void as negotiable instruments, a suit may nevertheless be maintained on such bonds, under some circumstances, as nonnegotiable instruments, and I have been unable to find a single paragraph in any of the decisions that fairly supports such a doctrine. The authorities show that, if negotiable paper is uttered by a municipal corporation without authority of law, it is void, and a suit cannot be maintained thereon for any purpose. Mayor v. Ray, 19 Wall. 468, 22 L. Ed. 164; Hitchcock v. Galveston, 96 U. S. 350, 24 L. Ed. 659; Little Rock v. Merchants' Nat. Bank, 98 U. S. 308, 25 L. Ed. 108; Wall v. Monroe Co., 103 U. S. 78, 26 L. Ed. 430; Hill v. City of Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069.

They show, no doubt, that when a municipal corporation sells bonds which are void, and receives the money, it may be compelled to restore it in an action for money had and received. So when a municipal corporation is authorized to purchase property for any purpose, or to contract for the erection of public buildings, or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. In no case, however, does it appear that a suit has been sustained on a void bond, treating it as nonnegotiable, and as something entirely different from what the parties intended it should be. As the court understands the cases, suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void. The demurrer to the plea must accordingly be overruled, because the first count is bad if it is regarded as stating a cause of action on the bonds. If it is treated as a suit to recover the value of certain stock which

the town lawfully subscribed and acquired, and has not paid for, then the plea of the statute may be a good plea.

At all events, it does not affirmatively appear that the plea in that event is untenable. The demurrer is overruled.

IV. Rights of Creditors [7]

SHAPLEIGH v. CITY OF SAN ANGELO.

(Supreme Court of the United States. 1897. 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310.)

In error to the circuit court of the United States for the Western District of Texas.

Mr. Justice SHIRAS.[8] In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen, and other functionaries. In pursuance of an ordinance of the city council, in May, 1889, there were issued the bonds in question in this case. It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a bona fide holder for value.

As things then stood, it is plain that the city could not have set up, to defeat its obligations, any supposed irregularity or illegality in its organization. The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: "If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." Graham v. City of Greenville, 67 Tex. 62, 2 S. W. 742.

But in 1890, at the fall term of the district court of Tom Green county, an information was filed by the county attorney against named persons, who were exercising and performing the duties, privileges, and functions of a mayor, and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the state, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said fun-

[7] For discussion of principles, see Cooley, Mun. Corp. § 152.

[8] Part of the opinion is omitted.

tions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of said city of San Angelo be, and the same was thereby, abolished, and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Subsequently, on February 10, 1892, the city of San Angelo was again incorporated, excluding the unimproved lands, but including all the improved part of the prior incorporation, and in which existed the streets and highways in the construction of which the proceeds of the said bonds had been expended.

What was the legal effect of the disincorporation of the city of San Angelo and of its subsequent reincorporation as respects the bonds in suit? Did the decree of the district court of Tom Green county, abolishing the city of San Angelo as incorporated in 1889, operate to render its incorporation void ab initio, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the state had continued to acquiesce in the validity of its incorporation?

Such a question was presented in Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896, and was answered in the following language:

"Although a municipal corporation, as far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government, yet, when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the constitution, which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and, although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one,

embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are presumed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the right of property of the corporation in its old form should accompany the corporation in its reorganization. * * * The principle which applies to the state would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the state, whatever changes may take place in its constitution of government. 'The new government,' says Wheaton, 'succeeds to the fiscal rights, and is bound to fulfill the fiscal obligations, of the former government. It becomes entitled to the public domain and other property of the state, and is bound to pay its debts previously contracted.'

"So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities." Mt. Pleasant v. Beckwith, 100 U. S. 520, 25 L. Ed. 699.

In Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620, it was held that when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory, but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them, which it had at the time of their creation, and which entered into the contracts, also survive, and pass into the new corporation.

There are other cases declaring the same views, but which it is needless to cite. The conclusions reached by this court may be thus expressed: The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is, therefore, effectual so far as it abolishes the old corporate organization; but when the same, or substantially the same, inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. 1 Dill. Mun. Corp. (4th Ed.) § 172.

This view of the law has been accepted and followed by the supreme court of the state of Texas.

The city of Corpus Christi, organized under the laws of the state of Texas, entered into a contract with Morris & Cummings, a private firm or partnership, whereby the latter were to make certain improvements and works in the Bay of Corpus Christi, and the city was to issue bonds in payment, with authority to the holders to collect tolls on vessels passing through the bay until the bonds were paid. The contract was so far executed that the improvements were made, and the bonds issued and delivered. Subsequently, by an act of the legislature of the state, the act incorporating the city of Corpus Christi, and all other acts relating to the incorporation and franchises of the same, were repealed. It was contended that this repeal operated to extinguish all right on the part of Morris & Cummings to collect tolls for the use by vessels of the channel they had constructed; but the court held that, while the power of the legislature to alter or repeal an act chartering a municipal corporation is undoubted, yet that this power cannot be exercised to the injury of creditors of the corporation or of persons holding contracts with it, especially when fully performed on their part, so as to entitle them to the compensation provided for in the contract,—citing Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699, that the repealing act must be considered in reference to the provision of the constitution of the United States forbidding the states to pass laws impairing the obligation of a contract, and also to a similar provision in the state constitution; that the same obligation to perform its contracts rests upon a corporation as upon a natural person; that while the legislature may deprive the corporation of its charterial rights, and forbid its exercising any of the governmental powers, it must not be presumed that it intended also to absolve it from its liabilities to creditors, or to contractors whose rights to compensation have become vested; and that, accordingly, the act of the legislature repealing the charter of the city of Corpus Christi cannot be construed to interfere with the right of Morris & Cummings to collect tolls, without violating both the constitution of the United States and of Texas. Morris v. State, 62 Tex. 730.

This decision was published in 1884, before the transactions in the present case.

The conclusion which is derivable from the authorities cited, and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants, and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation.

The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void ab initio, as being created without warrant of law, it could create no debts and

could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, and, if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor.

We come now to consider the legal effect of the act entitled "An act to amend article 541, chapter 11, title 17, of the Revised Civil Statutes of the State of Texas," approved April 13, 1891. That act was in the following terms:

"Section 1. When any corporation is abolished, as provided in the preceding article, or if any de facto corporation shall be declared void by any court of competent jurisdiction, or if the same shall cease to operate and exercise the functions of such de facto corporation, all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioners court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have the power to levy and collect a tax from the inhabitants of said town or village in the same manner as the said corporation would be entitled to under the provisions of this chapter: provided, that when any town or city shall reincorporate under chapters 1 to 11 of title 17 of the Revised Statutes upon a majority of the legal voters tax-paying property holders of said town or city, all property, real and personal, of the old or de facto corporation, shall be vested in the new one: and provided further, that the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation: provided, where cities and towns have reincorporated under chapters 1 to 11 of title 17 of the Revised Civil Statutes, prior to the adoption of this act, upon a majority vote of the tax-paying property owners of said city or town, all property, real and personal, of the old or de facto corporation shall be vested in the new one: and provided further, that the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation.

"Sec. 2. In all cases where the commissioners court shall be vested with the authority conferred on them by this act, it shall be the duty of such court to appoint a suitable person to perform the duty of tax collector, whose duty it shall be to collect the tax within the territory comprised in the dissolved corporation, until such legal indebtedness of such corporation has been paid off or until such city or town has been reincorporated, and shall fix his bond in sufficient penalties to protect any fund collected: provided, that such appointee may be

removed at any time for carelessness or insufficiency or other good cause."

Gen. Laws Tex. 1891, c. 77, p. 95.

The provisions of this act might be reasonably interpreted as consistent with the principles heretofore stated, and as providing a method of enforcing the rights of creditors. But it appears that the supreme court of Texas has construed the act as requiring a vote of the taxpaying voters in favor of assuming the debt before the new incorporation can be held for it. City of Quanah v. White, 88 Tex. 14, 28 S. W. 1065.

If this, indeed, be so,—and it is difficult to reconcile such a view with those previously expressed by that court,—then it would follow, as we think, that said act, so construed, must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that by a voluntary reincorporation and a taking over of the property rights of the old corporation the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon a vote of the taxpayers.

When the bonds in question were issued and became the property of the plaintiff, he was entitled not merely to the contract of payment expressed in the bonds, but to the remedies implied by existing law. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143; Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. * * *

When we hold that the new corporation, under the facts disclosed by this record, is subject to the obligations of the preceding corporation, we mean subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings, not inconsistent with this opinion.

TAXATION

I. Source of Power[1]

STATE v. CITY OF DES MOINES.

(Supreme Court of Iowa, 1897. 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157.)

Action for mandamus to compel the city council of the city of Des Moines to levy a tax for the purpose of creating a sinking fund to build a library building in said city, and to compel said city council to levy a tax for the maintenance of a library. Jury waived, trial to the court, and judgment for defendants for costs. Plaintiff appeals.

KINNE, C. J.[2] 1. The conceded facts in this case are as follows: The city of Des Moines, a city of the first class, in 1882, by a vote of its electors, accepted the provisions of the statute of this state relating to the establishment and maintenance of free public libraries, and had, in the exercise of the powers conferred upon it, established and was maintaining such a library. In pursuance of law a board of library trustees had been appointed, and was exercising the powers and duties imposed upon it. On July 31, 1896, said board of trustees did fix and determine a rate of taxation of one mill on the dollar of the taxable valuation of the property in said city for the purpose of maintaining the public library, and at the same time did fix and determine a rate of taxation of three mills on the dollar for the purpose of creating a sinking fund for the purchase of a lot and the erection of a library building, and did cause said amounts so fixed and determined to be certified to the city council of said city. Said city council refused to levy and certify to the county auditor said amounts so certified to them by said board of library trustees, but did levy and certify one-half a mill tax for the purpose of the maintenance of the library. Thereupon this action was brought to obtain a writ of mandamus compelling the city council to levy and certify the rates of taxes fixed and determined by the board of library trustees.

As is said by counsel for appellants: "The ultimate question to be determined is whether or not the city council in cities of the first class accepting the provisions of the statute relating to the establishment and maintenance of free public libraries, and maintaining such library, is bound and required to levy and certify the amount of taxes or the rate of taxation fixed and determined by the board of library trustees of said city."

[1] For discussion of principles, see Cooley, Mun. Corp. § 137.

[2] Part of the opinion is omitted.

2. On the one hand it is contended that the statute vests in the board of library trustees absolute power to fix and determine the amount of the levy to be made for the purpose of maintenance of the library, and of creating a sinking fund for the purchase of a lot and the erection of a library building, subject only to the limitations in the statute; and that the duty devolves upon the city council to levy and certify the sums so certified to them by said board; that the city council is without any discretion in the matter. On the contrary, the appellees contend that the board of library trustees has no such power; that its power in the matter is advisory merely, and that the city council is invested with a discretion as to the amount or amounts which shall be levied for the purposes mentioned. As in the discussion which may follow reference may be made to various acts of the legislature touching the creation and maintenance of free public libraries, it may tend to brevity to here recite the substance of all such statutes which can have any bearing upon the question under consideration.

Chapter 45, Acts 13th Gen. Assem., provided that cities of the first and second classes might levy an annual tax not exceeding one-half mill on the dollar of the taxable property in such city for the maintenance of a free public library and reading room, provided a suitable lot and building be first donated for such purposes. The city council was authorized to appoint officers for such library and reading room. The 14th general assembly, in chapter 47, extended the provision of the former act so as to include incorporated towns, increased the amount of the levy, and authorized all the municipalities referred to in the act out of the money raised to purchase land and erect buildings or lease rooms. The act also provided that before exercising any of the powers conferred it should be accepted by a vote of the people. The same provisions, in substance, were incorporated in the Code of 1873 (section 461), in which it was declared that "the establishment and maintenance of a free public library is hereby declared to be a proper and legitimate object of municipal expenditure." Such was the law in force at the time the electors of the city of Des Moines voted to accept its provisions, and to establish a free public library.

By chapter 41, Acts 25th Gen. Assem., it was provided that in any city which had accepted the provisions of Code, § 461, there should be created a board of library trustees, to be appointed by the mayor, with the approval of the council, * * * and said act also contained the following, viz.: "The board of library trustees shall, before the first day of August in each year, determine and fix the amount or rate to be appropriated for one year under section 461 of the Code of Iowa for the maintenance of such library, and cause the same so fixed to be certified to the council, and the council shall make such appropriation and levy the necessary tax for such year to raise said sum and certify the percentage or rate not exceeding one mill on the dollar of such tax to the county auditor, * * * provided that in cities of the first class the city council may and shall levy and certify such fur-

ther sum of tax as it may deem expedient to create a sinking fund and pay interest under the provisions of chapter 18, Acts of the 22d General Assembly, and acts amendatory thereof." By chapter 99 of the acts of the same general assembly power was conferred upon the city to levy and collect a tax of not exceeding three mills on the dollar to pay interest on any indebtedness theretofore contracted or to be thereafter contracted or incurred for the purchase of real estate and the erection of a building or buildings for a public library, and to create a sinking fund for the payment of such indebtedness. * * *

By chapter 50, Acts 26th Gen. Assem., it was provided that the board of library trustees should determine and fix the rate, not exceeding one mill on the dollar, for the maintenance of the library, and not exceeding three mills on the dollar for the purpose of paying for a building and the creation of a sinking fund, and "cause each of the amounts or rates so determined and fixed to be certified to the council, and the council shall levy the taxes necessary to raise said sums respectively for such year, and certify the percentage or rates * * * of such tax to the county auditor."

In pursuance of the provisions of chapter 41, Acts 25th Gen. Assem., a board of library trustees had been appointed. In March, 1892, the city of Des Moines, as it then existed, by a vote of the electors accepted the benefit of the law relating to public libraries. Prior to the passage of the acts of the 26th general assembly, the city council was clearly invested with discretionary power as to levying a tax for a library building and for the creation of a sinking fund. The act of the 26th general assembly in terms seems to require the council to levy and certify the tax certified to it for maintenance and for building or sinking fund so long as the same does not exceed the amount provided by the statute.

3. The questions involved in this appeal are of great interest and importance. Irrespective of our duty to uphold the act of the legislature as constitutional, if it be possible to do so without doing violence to well-known legal principles and accepted canons of construction, our interest in the welfare of the people, which is so largely promoted by the establishment and maintenance of public libraries, would prompt us to give the questions presented most careful consideration. If it be conceded that a tax for the maintenance of a public library and for the erection of a library building is a tax for a public purpose, and hence one which, in furtherance of the general public policy of the state, may be compelled to be levied, may the legislature authorize its levy by the board of library trustees?

Touching the power of the legislature to delegate the taxing power, Judge Cooley says: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no excep-

tion, and it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power, and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive. These exceptions relate to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into matters of taxation; the state in very many cases doing little beyond prescribing rules of limitation within which, for local purposes, the local authorities may levy taxes. * * * The legislature, however, in thus making delegation of the power to tax, must take it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. * * * What is true of the state is equally true of the municipality,—that the power they possess to tax must be exercised by the corporation itself, and cannot be delegated to its officers or other agencies." Cooley, Tax'n (2d Ed.) pp. 61, 63, 65. The doctrine laid down by the learned author is that the delegation of the power to tax by the legislature must be made to the municipality itself, and that it cannot be delegated to other agencies.

The constitution of the state of Illinois contains the following provision: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." Const. Ill. 1848, art. 9, § 5. In construing this provision, the supreme court of that state said that the phrase "corporate authorities," as used in the constitution, must be understood as "those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent." People v. Mayor, etc., of City of Chicago, 51 Ill. 17, 2 Am. Rep. 278. The same court, in construing the same constitutional provision, said: "The power of taxation is, of all powers of government the one most liable to abuse, even when exercised by the direct representatives of the people; and, if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would simply be a question of time. No person or class of persons can be safely intrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly

exercised for public uses by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated." Harward v. Drainage Co., 51 Ill. 130. * * *

The legislature of the state of Kansas passed an act authorizing the creation of a board of road commissioners, and empowering them, among other things, to levy taxes. The act was held unconstitutional. Board of Com'rs v. Abbott, 52 Kan. 148, 34 Pac. 416. The question of the constitutionality of the same act came before the federal court, and the court said: "Does the constitution of the state of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be absolutely forced upon these taxpayers of the county, either by the individuals or by officials in whose appointment they have had no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed, and their powers limited, by organic law; and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly, those directly interested may then remove them, and appoint others. If those directly interested have no voice in their appointment, or power to remove them, they have no means of correcting their abuses. No other rule can secure those to be taxed from oppression and fraud on the part of the taxing officers. * * * The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people. The right of life, liberty, and property is among

the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the protection, and not for the destruction, of these reserved rights of the people. Illegal or oppressive taxation is destructive of the right of property, and is not government, under the constitution; but is misgovernment." Parks v. Board of Com'rs, 61 Fed. 436. * * *

Under our Constitution the power of taxation has been vested by the people in the legislature. Const. Iowa, art. 3, § 1; City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 643. There is no express constitutional restriction or limitation upon the power of the legislature in this state, and that body may, for proper and legitimate purposes, confer the taxing power upon municipalities. 2 Dill. Mun. Corp. § 740; 25 Am. & Eng. Enc. Law, pp. 18, 71. Nevertheless, in the absence of such constitutional restriction, the power of the legislature to confer the right of taxation is limited by implication. Prouty v. Stover, 11 Kan. 235. So it is said in Hanson v. Vernon, 27 Iowa, 73, 1 Am. Rep. 215: "It cannot be maintained that the constitution confers upon the state government absolute and unlimited legislative power, authorizing all laws affecting the rights and property of the people, not expressly prohibited by that instrument. * * * There is, as it were, back of the written constitution, an unwritten constitution, if I may use the expression, which guaranties and well protects all absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the constitution, nor preserved by express provisions thereof, notwithstanding they exist, and are possessed by the people free from governmental interference." We say, then, that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. * * *

It is said that it is not true that power to determine the rate of taxes must be committed to the proper legislative authority of the corporation, and certain instances in this state are cited as the power given the executive council to determine the rate of tax for state purposes. Code 1873, § 835. But counsel have cited no instance in the legislation of this state, and we have found none, where the power to tax was conferred upon a board or officer not elected by and immediately responsible to the people, and we are unwilling to extend the right to delegate such power to any body or person not directly representing the people. The danger which lies in delegating such power to any person or board not directly responsible to the taxpayers is so forcibly set forth in the citations we have made that we need not enlarge upon it. If the power to tax may be by them vested in a board of library trustees, against the will of the people, it may be reposed in any other body which is not directly accountable to the people. * * *

We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which, upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary, and far-reaching power ought not to be conferred upon a body of persons who are not the direct representatives of the people, who are not elected by them, and who, therefore, are not directly responsible to them unless the people assent thereto. * * *

The power to determine and levy taxes is inherent in government. Its exercise for proper purposes is essential to the very existence of government. When exercised in a lawful manner, and by proper agencies of the state, the burdens imposed must be borne by those upon whom they fall; but when exercised by officers and bodies charged with no direct responsibility to the people the temptation to place upon the people unnecessary burdens under the guise of taxation, and to take from them a portion of their property not needed for legitimate purposes of government, is great. It may be admitted in the case before us that the board of library trustees is composed of high-minded, honorable men and women, and it may be that this board is better qualified to know what such tax should be than is the city council. However that may be, the principle is wrong, and the power of taxation attempted to be conferred upon the trustees is a long step in the direction of permitting boards not elected by or directly responsible to the people to determine what burden the taxpayers' property shall bear. We hold that no officer and no board not elected by and immediately responsible to the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of the wrong at the polls; but if it be reposed in a body not elected by the people the remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation, as to duration, attempted to be conferred by the act under consideration, is of itself a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred upon some body which stands as the direct representative of the people, to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear such burdens. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discre-

tion) the amounts fixed by the library board, and certified to said council.

The questions involved in the case were not raised or considered in Orvis v. Board of Com'rs, 88 Iowa, 674, 56 N. W. 294, 45 Am. St. Rep. 252. The action of the district court in refusing a writ of mandamus and in rendering a judgment against the plaintiff for costs was correct, and the judgment is affirmed.

II. Public Purpose Only [3]

MANNING v. CITY OF DEVILS LAKE.

(Supreme Court of North Dakota, 1904. 13 N. D. 47, 99 N. W. 51, 65 L. R. A. 187, 112 Am. St. Rep. 652.)

Action by Mabel Manning against the city of Devils Lake and others. Judgment for plaintiff, and defendants appeal.

YOUNG, C. J.[4] The defendants appeal from an order of the district court of Ramsey county continuing a temporary injunction, made upon an order to show cause. The action in aid of which the restraining order was issued is brought for the purpose of permanently enjoining the defendants from issuing and negotiating certain bonds which it proposes to issue for the purpose of constructing and maintaining a certain road or bridge across an arm of Devils Lake. The plaintiff alleges in her complaint that she is a resident, property owner, and taxpayer in the city of Devils Lake; that said city is a municipal corporation organized under the laws of this state; that, at a city election called for that purpose, a majority of the electors voted to issue bonds of said city, in the sum of $6,500, for the purpose of paying the cost of construction and maintenance of a certain bridge, known as the "Pelican Point Bridge," and for paying outstanding warrants of the city of Devils Lake, issued in aid of such purpose; that the defendant Ole Skratass, the auditor of said city, has advertised for bids for said bonds; that said Pelican Point Bridge is located several miles outside of the corporate limits of said city; that the acts of the defendant and its officers in attempting to issue and dispose of said bonds for the purpose aforesaid are ultra vires and wholly void. * * *

The question involved is one entirely of corporate power. The facts are not in dispute. From the statement of facts prefixed to appellants' brief, it appears that the so-called Pelican Point Bridge is situ-

[3] For discussion of principles, see Cooley, Mun. Corp. §§ 139–141.

[4] Part of the opinion is omitted.

ated in Lake township, between four and five miles southwest of, and outside of the corporate limits of, the city of Devils Lake, and consists of an embankment of earth and stone, connecting the north and south shores of Devils Lake at its narrowest point. In the center, where the water is deepest, there is a pontoon bridge or barge, about 100 feet in length, connecting the embankments. The affidavits show that the construction of this so-called bridge was commenced in the spring of 1900 by the business men of the city of Devils Lake, acting through a citizens' committee, and that a large sum of money was raised by private subscription and expended upon its construction. The land on the north side of the lake belongs to the state military reservation, and by chapter 134, p. 173, Laws 1901, the Legislature granted the right to locate a highway thereon, and a highway was located by the township of Lake, in which said military reservation is situated, connecting the embankments with the public highways leading to the city of Devils Lake. The land on the south side is included in the Ft. Totten Indian reservation. The affidavits state that the city of Devils Lake acquired a right of way over the tract of land abutting on the south side from the allottee Indian owning the same, with the consent of the United States government. The road, as constructed by the citizens' committee, aside from the pontoon bridge in the center, extended about 3 feet above the surface of the water. Since 1901 the waters of Devils Lake have risen about 38 inches, necessitating the raising of the embankments. Some $12,000 have been expended. The expenditures now proposed are necessary to put the road in permanent and safe condition.

The affidavits filed by the defendants show that there is a large territory south of the city of Devils Lake, and a large number of people tributary, who will do their trading at that city if the bridge is constructed and maintained; that "the amount of increased trade and business brought to the city of Devils Lake during the time said highway was passable in the summer of 1901 * * * aggregated an average of approximately two hundred fifty dollars a day; that said increased business was general in character, and a direct benefit to all engaged in business in said city of Devils Lake at said time." The affidavits also show that there are more than 1,000 allottee Indians residing on the Ft. Totten Indian reservation, on the south side of the lake, who are largely engaged in agricultural pursuits, and who will do their trading at the city of Devils Lake, providing the highway in question is maintained; that there are a large number of persons in "the Cheyenne River country" who are "naturally tributary to the city of Devils Lake," and who would "market their wood and purchase their supplies at Devils Lake if the bridge were maintained"; that there are a large number of instructors in the industrial school on the Indian reservation; that said school consumes a vast amount of all kinds of merchandise and supplies, a large portion of which would be purchased at said city if said highway is opened for travel;

that there is approximately 100,000 acres of unoccupied and unallotted land on the Indian reservation, which it is proposed to open to settlers, and that this, when occupied and cultivated, will increase the commercial importance of the city of Devils Lake if said highway is maintained; that the completion and maintenance of said highway communicating with the land south of Devils Lake "will greatly increase the amount of marketing and trading done at said city of Devils Lake, and otherwise greatly improve and extend its commercial relations." It is also stated that "the construction, completion, and maintenance of said highway known as 'Pelican Point Bridge' is a commercial necessity to said city, and that it will greatly extend the commercial importance and trade relations of the said city; that it will greatly increase the amount of grain marketed in said city, and very materially increase and extend the territory tributary to the said city of Devils Lake, and will be a direct benefit, to a very appreciable extent, to every merchant, property owner, taxpayer, and resident of said city."

There are two sufficient reasons why the proposed expenditure is illegal. It must be conceded that the validity of the bonds and warrants in question cannot be sustained unless the city has power to provide for their payment by taxation. * * * The validity of a contract of a municipal corporation which can only be fulfilled by resort to taxation depends on the power to levy a tax for that purpose. Savings & Loan Ass'n v. Topeka, 20 Wall. (87 U. S.) 655, 22 L. Ed. 455; Sharpless v. Mayor, 21 Pa. 147, 167, 59 Am. Dec. 759; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215; Allen v. Inhab. of J., 60 Me. 127, 11 Am. Rep. 185; Whiting v. Fond du Lac, 25 Wis. 188, 3 Am. Rep. 30.

It is proposed to expend funds derived from a sale of these bonds upon a road or bridge which is not a legal highway. Such an expenditure will not authorize the inposition of a tax. "It has been decided that an assessment for making and opening a road, where no road has in fact been laid out, and where consequently the land is the subject of private ownership, and no highway would exist when the money was expended, would be illegal and void." 1 Cooley on Tax'n (3d Ed.) 216; Philbrook v. Kennebec, 17 Me. 196; People v. Saginaw Supervisors, 26 Mich. 22; Pacific Bridge Co. v. Kirkham, 54 Cal. 558; Snyder v. Foster, 77 Iowa, 638, 42 N. W. 506. See, also, Coates v. Campbell, 37 Minn. 498, 35 N. W. 366. Bridges constitute a part of the public highway. Section 1091, Rev. Codes. Section 1053, Rev. Codes, which is a part of chapter 17 of the Political Code of 1899, commits the power to open highways outside of the limits of incorporated cities, villages, or towns, "all proceedings relative thereto," and "all matters connected therewith," to the board of county commissioners or board of township supervisors. Section 1114, Rev. Codes 1899, charges township supervisors with the care and supervision of roads and bridges within their respective townships.

It is not claimed that the county commissioners of Ramsey county, or the supervisors of Lake township, in which the "bridge" is situated, have taken any action whatever either to locate it or recognize it as a highway. It has not acquired a legal character as a public highway by user, under section 1050, Rev. Codes 1899, and there is no pretense that it was laid out and established as a highway under chapter 17 of the Political Code of 1899. On the contrary, it was constructed, as we have seen, by private individuals and by private subscription. The duty of maintaining and keeping in repair a public highway, regularly established (that is, a legal highway), may be enforced, and the public interests thereby protected. See 2 Cooley on Tax'n (3d Ed.) 1293, and cases cited. The construction of this road imposed no such obligation upon the individuals who constructed it, or upon the county or township in which it is situated. In short, there exists no duty to maintain and keep it in repair which the public can enforce. Travis v. Skinner, 72 Mich. 152, 40 N. W. 234; Anthony v. Inhab. of Adams, 42 Mass. (1 Metc.) 284; City of Goshen v. Myers, 119 Ind. 196, 21 N. E. 657; Board of Township, 121 Ind. 379, 23 N. E. 257; Houfe v. Town, 34 Wis. 608, 17 Am. Rep. 463; State v. Supervisors, 41 Wis. 28. If, therefore, no other objection existed than that just considered, it alone would be sufficient to render the proposed expenditure illegal.

But aside from the fact that it is proposed to expend funds derived by local taxation upon a bridge which is not located upon a legal highway, the proposed expenditure is illegal for another reason. It is not for a corporate use or purpose, but is, on the contrary, for private benefit. The doctrine of the cases on this point is stated in 2 Dillon on Munic. Corp. (4th Ed.) § 736 (587), as follows: "The taxing power of the state consists in its authority to levy and collect taxes and assessments, which are in the nature of special taxes. Taxes (including in the term assessments) are burdens or charges imposed by the Legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private, purposes, or to accomplish some end or object public in its nature. There can be no legitimate taxation to raise money, unless it be destined for the uses and benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of the tax." * * *

The development of the commerce or trade of a city is not a corporate purpose. Instances are numerous where cities have attempted to promote their commercial importance by aiding manufacturing and industrial enterprises through the aid of local taxation, and in every instance the attempted exercise of power, when called in question, has been condemned as unlawful. To bring any particular subject within the description of a corporate purpose, "it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as

established by law or by long usage." Spaulding v. Lowell, 40 Mass. (23 Pick.) 71. "Municipal corporations possess only a limited right to bind themselves and the inhabitants and property within their respective limits by civil contracts. Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, and a right to defend; but here is the extent at once of their right and their power. They cannot engage in enterprises foreign to the purpose for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers." Vincent v. Inhab. of Nantucket, 66 Mass. (12 Cush.) 103. * * *

In Ottawa v. Cary, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669, it was said that the power to govern a city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. "The charter confers all the powers usually granted to a city for the purposes of local government, but that has never been supposed, of itself, to authorize taxes for everything which, in the opinion of the city authorities, would promote the general prosperity and welfare of the municipality. Undoubtedly, development of the water power of the streams that traverse the city would add to the commerce and growth of the citizens. But certainly power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. * * *"

In 1 Cooley on Tax'n (3d Ed.) 206, it is said that: "However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may therefore be safely asserted that taxation for the purpose of raising money from the public to be given or even loaned to private persons, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law, it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation." * * *

It may be safely stated that no case can be found sustaining an expenditure by a city, as for a corporate use and purpose, when the principal object of the expenditure is to promote the trade and business interests of the city, and the benefit to the inhabitants is merely indirect and incidental. The cases condemning such efforts are almost

numberless. In 1872 the business and manufacturing district of Boston was destroyed by fire. The Legislature of Massachusetts, called in special session for that purpose, passed an act authorizing the city of Boston to issue bonds to the amount of $20,000,000 to render aid in the way of loans in rebuilding the burned district. In a well-reasoned opinion, the soundness of which has never been questioned, but always approved, the Supreme Court of that state held that the proposed expenditure was not for a public use or purpose, and would not sustain the power of taxation, and that the act was unconstitutional and void. We quote at length from the very lucid opinion in that case: "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion. * * *"

The facts of this case bring it within the principle of the cases to which we have just referred. The proposed expenditure is not for a bridge upon the streets of the city, nor at or near its boundaries, for the convenience of its inhabitants. On the contrary, the "bridge" in question is almost five miles from the city limits, and is neither a necessity, nor even a convenience, to the inhabitants of the city for traveling purposes. Its utility and avowed purpose is to provide the inhabitants of an outlying and remote district lying south of the lake with a convenient mode of reaching the city of Devils Lake to do their trading, and thereby increase the trade of the merchants and business men of the city. The direct purpose of the expenditure is for the benefit of those who will travel the road, and the business men who will profit by their trade. The benefit which will accrue to the inhabitants of the city is merely incidental and indirect. As has already been pointed out, such benefits do not constitute a public purpose for which a tax may be imposed. The expenditure is essentially for a

private purpose. For this reason, and independent of all other considerations, the bonds in question are unauthorized and void.

In reaching this conclusion, we do not unqualifiedly assent to the contention of plaintiff's counsel that the boundaries of a city mark the limits of the lawful exercise of its corporate power, and that there can be no expenditure for a corporate purpose, the object of which is located outside of its boundaries. For obvious reasons, the exercise of its political and governmental powers is restricted by its boundaries. But, in the exercise of other corporate functions, which affect the health, safety, and convenience of its inhabitants, and may be said to be of a private nature, the reason for the limitation which rests upon the exercise of its governmental and political power does not exist. For this reason it has been generally held that a city can expend corporate funds for parks, drains, sewers, waterworks, breakwaters, pesthouses, and cemeteries. It has also been held that they may construct bridges at or immediately outside of their boundaries, when necessary to serve the convenience of their inhabitants. Such was the holding in the Brooklyn Bridge Case (People v. Kelly, 76 N. Y. 475), and for the same reasons the right has been sustained in numerous other cases. The power of a city corporation to exercise functions of a private nature outside of its limits is recognized to some extent by the statute in enumerating the powers of city councils. See subdivisions 7, 60, § 2148, and section 2503, Rev. Codes 1899. But as already stated, the "bridge" here in question cannot be said to be a convenience to the inhabitants of the city of Devils Lake.

The proposed expenditure cannot, therefore, be sustained as for a corporate purpose. The order appealed from will be affirmed. All concur.

III. Subjects of Taxation [5]

ADAMS v. DUCATE.

(Supreme Court of Mississippi, 1905. 86 Miss. 276, 38 South. 497.)

W. K. M. Ducate and others were assessed for back taxes by the city of Biloxi, for taxes alleged to be due for the years from 1886 to 1896, inclusive, on personal property owned by them during these years. The city assessor, on the order of the state revenue collector, assessed this property as property which had escaped taxation, and notice was given as required by law. Ducate and the others appeared before the mayor and board of aldermen and objected to the assessments, and they were vacated. From that order the revenue agent ap-

[5] For discussion of principles, see Cooley, Mun. Corp. § 143.

pealed to the circuit court, where the action of the mayor and board of aldermen was affirmed. From that judgment this appeal is taken.

Truly, J. The charter of the city of Biloxi provides: "That the resources of the corporation may be derived from such establishments as may be authorized and put to use or rent, and from the taxes on privileges granted under the provisions of this act, and from the fines to be assessed for the violations of its ordinances, and the mayor and aldermen are hereby authorized to levy and collect for the use of said town, on all real estate within the corporation, which is by law taxable for state purposes: provided, that said tax shall not exceed in any one year one-fourth of one per cent. upon its assessed value, and said mayor and aldermen shall have power to tax vendors of vinous and spirituous liquors an amount not to exceed fifty per cent. of the amount levied for state purposes."

This constitutes the sole authority which the municipal authorities possess with regard to the levying of taxes, and, as the power of the revenue agent is purely a derivative one, it also defines the scope of his authority in the premises. It will be noted that by the fundamental law of this municipality its resources are to be derived from certain specifically and definitely designated sources. It is not granted any general authority to levy taxes, but merely a restricted power to levy on a certain specifically denominated species of property. The principle of law that a municipality can only exercise such general power of taxation as is delegated to it by the state is of such universal acceptation as to be now both unquestioned and unquestionable. If the sovereign does not expressly delegate power to tax to a municipality, it can levy no taxes for general purposes by any inherent power.

In the instant case we find that the city of Biloxi was not granted any power to assess any tax on any class or species of personal property. Being without power to make such levy, acting through its own legally constituted fiscal officers, the revenue agent cannot compel it to levy such tax. This distinction is plainly recognized in the case of Adams, Rev. Agt., v. Kuykendall, 83 Miss. 571, 35 South. 830. That case was one where the Legislature, having granted a municipality full and complete power to assess taxes upon every species of property, both real and personal, undertook to except from the operation of this general grant of power a certain specially favored class of solvent credits, and this exception was held to be invalid, as being in contravention of the "uniformity and equality" clause of the Constitution. But in that case the court says: "It may be taken as an established doctrine that municipalities derive their power of levying taxes for general purposes only through a delegation from the state. The sovereign power of taxation is vested solely in the state." In the instant case the sovereign did not choose to grant the city of Biloxi a general and unlimited power to levy taxes, and no taxing power can be vested in a municipality, nor can a restricted grant be expanded, by judicial construction. This would be legislation.

The authorities of the municipality being without power to levy the tax which the revenue agent seeks to have imposed and collected, it follows that the judgment of the circuit court in refusing to command them to do an unwarranted and void act was correct. Affirmed.

PERKINS v. CITY OF BURLINGTON.

(Supreme Court of Iowa, 1889. 77 Iowa, 553, 42 N. W. 441.)

The plaintiff is the owner of 18 acres of land within the corporate limits of the city of Burlington. In the year 1886 the city authorities assessed said land for taxation, and levied taxes thereon for city purposes. The plaintiff brought this action in equity, to enjoin the city and its treasurer from the collection of said taxes, upon the ground that said land was not subject to city taxes. The cause was submitted to the court upon an agreed statement of facts, and there was a decree dismissing the petition. Plaintiff appeals.

ROTHROCK, J.[6] 1. The land upon which the taxes were levied constitutes the plaintiff's homestead, and it lies within the boundaries of the city, as defined by an act of the general assembly of this state, approved February 14, 1851. No city taxes were levied upon the land until the year 1886. The location and purposes for which the premises have been used are set forth in the agreed statement of facts, as follows:

"The aforesaid tract of land is not, and has never been, divided into lots, nor intersected by streets or alleys, but has been used and occupied in one entire tract by the plaintiff as his homestead. About three-quarters of an acre is occupied by the house and a portion of the lawn of the plaintiff; about an acre is occupied by barns and outbuildings and stable-yard, and a small portion is occupied by a house, for the accommodation and residence of the plaintiff's servant, engaged in the care of his domestic animals and other matters about his residence, and from which no rent is now, or ever has been, derived, except as the same has been included in the compensation of the servant for his labor. The remainder of the tract of land is occupied by garden, orchard, and wooded pasture-land. The tract is situated more than one mile from the business center, and a large part thereof is not suitable for subdivision into lots."

Second. "It is further agreed that the above-described tract of land is not held for speculative purposes, nor with the intention of dividing the same into lots, but that it is, and for many years has been, occupied by the plaintiff and his family as their homestead and residence, and used in good faith, in the manner and for the purposes above set out, and for no other purpose, and with the intention of so continuing."

[6] Part of the opinion is omitted.

A plat of the land, and of that part of the city adjacent to it, is exhibited with and made a part of the agreed statement of facts, from which it appears that the land adjoining plaintiff's, on all sides, is laid out in lots and streets and alleys. There are streets on three sides, and an alley on the other side. An electric light is maintained by the city at the intersection of the streets, at one corner of the land, and the city also lights at public expense a line of gas-lamps upon one of the streets to plaintiff's house. The city water-works extend to plaintiff's residence, and there is a public hydrant in front of his house. A fire station is maintained by the city near the land. Street-cars run on two sides, and one block from the land. The city works and has in reasonably good condition all the streets surrounding the property; and there is a public school building about two blocks distant.

From these facts it would seem that, under the authority of Fulton v. City of Davenport, 17 Iowa, 404, and Brooks v. Polk Co., 52 Iowa, 460, 3 N. W. 494, the plaintiff's land is subject to taxation for city purposes. The plaintiff appears to have all the benefits of light, water, streets, railroads, and fire stations, which are common to that part of the city which surrounds his land. * * * Affirmed.

TAYLOR v. CITY OF WAVERLY.

(Supreme Court of Iowa, 1895. 94 Iowa, 661, 63 N. W. 347.)

Plaintiff, the owner of 90 acres of land situated within the incorporated limits of the defendant city, prosecutes this action to cancel certain taxes levied upon said lands for general incorporation purposes for the year 1893, and to restrain the collection thereof. Judgment was entered for plaintiff as prayed. Defendant appeals.

GIVEN, C. J. 1. The grounds upon which plaintiff claims that his lands are exempt from taxation for general municipal purposes other than for road tax are as follows:

"Par. 3. That said lands and each piece and tract thereof is occupied and used in good faith by the owner for agricultural purposes only.

"Par. 4. That none of said lands have been laid out or platted into city lots, nor is it held for future speculation as city property or for platting as such.

"Par. 5. That none of it adjoins any part of the platted portion of said city, nor does any of it lie so near to the platted part of the city that the corporate authorities cannot open and improve its streets and alleys and extend to the inhabitants of the city the usual police regulations and advantages without incidentally benefiting the proprietors in personal privileges and accommodations or the enhancement of the value of any part thereof.

"Par. 6. That none of the land derives any benefit from the water works or the street lighting or the police regulations of said city, or any special advantages from the work done on streets of the city, and none of the lands are needed for the extension of the streets or alleys of said city."

The rule in such cases is stated in Fulton v. City of Davenport, 17 Iowa, 405, as follows: "But the rule which we would deduce on this subject, and under which a large majority of cases might, as it seems to us, be determined, is this: When the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the same arises; but in its exercise great care and circumspection should be observed, lest perchance injustice and oppression may ensue." In Durant v. Kauffman, 34 Iowa, 194, it is said: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefit from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject,"—citing cases.

2. We think the evidence fully establishes each of the allegations made by plaintiff quoted above. The land has always been occupied and used for agricultural purposes only, except that for a time the dwelling house, outbuildings, and ground used therewith were rented for residence purposes to one who was not engaged in farming the land. The land is not adjoining the platted portion of the defendant city, but is remote therefrom, with other unplatted farm lands lying between. None of this land has ever been laid out or platted into city lots, nor does it appear to have been held for future speculation as city property. There is no street or alley extending to these lands, except a public highway, running along the west line thereof. The nearest street, alley, or sidewalk is 200 rods distant from said land, the nearest hydrant 250 rods, the nearest city lamp 250 rods, and the nearest water supply for extinguishing fire is one mile distant, and the property is outside of the reach of the city's fire protection.

It is argued on behalf of the appellant that the property was not being used exclusively for agricultural purposes, that it was at least incidentally benefited by the police and fire protection afforded by the city, and by the privileges of the city library. We do not think that the mere fact that the house was separately rented from the lands for a time made the use other than it theretofore had been, namely,

for agricultural purposes. It is quite evident that this remote place neither needed nor received any protection from the very limited police force of the defendant city, and, as we have said, the property was entirely out of reach of any of the appliances of the city for extinguishing fires. While it is true the occupants of this property might enjoy the privileges of the city library, it does not appear that those privileges were limited to residents within the city limits. The fact is that this land, remote as it is, is not available as city property for either residence or business purposes, under the present demands of the defendant city. It does not adjoin the platted portion of the city, is not needed for streets or alleys, and derives no benefit whatever from taxes expended for city purposes other than the road tax which goes to keep in repair the highway by which the city is reached.

We think the case is clearly within the rule as we have quoted it above, and that the judgment of the district court should be affirmed.

ACTIONS

I. Mandamus [1]

STEVENS v. MILLER.

(Court of Appeals of Kansas, 1896. 3 Kan. App. 192, 43 Pac. 439.)

COLE, J.[2] On October 19, 1888, Ida L. Miller recovered a judgment against the city of Parsons for injuries received upon a defective sidewalk in said city. On November 19, 1888, said Ida L. Miller died, intestate, leaving as her heirs at law her husband and one child. On March 4, 1889, the action was revived in the names of William C. Miller, husband of Ida L. Miller, deceased, and J. H. Lyles, guardian of said minor child. Said revivor was had upon due notice to the defendant and appearance by its attorney, and without objection upon the part of the defendant. Thereupon the city of Parsons made a case for the supreme court, which was on March 29, 1890, dismissed by said court. On May 6, 1890, a petition was presented to the district court of Labette county for an alternative writ of mandamus to compel the levy of a tax for the payment of said judgment. The alternative writ was granted on said date, and on the 22d of May the city of Parsons appeared in the district court, and filed a motion to quash said writ, for reasons contained in the motion; and thereupon, on the 25th of May, the district court, upon motion of the plaintiffs below, allowed the said writ to be amended, the defendant being present by its attorney, and having notice of said amendment. The defendant then filed its answer and return, which consisted of a general denial and an allegation that the revivor proceedings were had without notice to the defendant city of Parsons; that the same were void; that plaintiffs had no interest in the said judgment; and that the said city did not owe, and could not safely pay, any part of the same to them. Upon the hearing of said cause, a peremptory writ was allowed, and from the order allowing the same the city of Parsons brings the case here for review. * * *

We come now to the important question involved in this case, and that is: Can the district court compel, by writ of mandamus, the levying of a tax by the mayor and council of a city of the second class to provide the necessary funds for the payment of a judgment rendered against said city in an action for damages occasioned by the negligence of said city? While we are of the opinion in this case that plaintiffs in error are hardly in position, under their answer to

[1] For discussion of principles, see Cooley, Mun. Corp. § 156.

[2] Part of the opinion is omitted.

the writ, to raise this question, we are not willing to decide that they are not, and the question is one of considerable importance to the state at large, and ought to be squarely considered. It is claimed by counsel for plaintiffs in error that the only method of collecting such a judgment against a city of the second class in this state is by execution, and counsel relies to support that proposition upon the case of City of Independence v. Trouvalle, supra [15 Kan. 70]. In that case an action was brought against the city for services performed by the marshal under an ordinance relating to the killing of dogs, and a judgment was obtained against the city, and execution awarded. The question of the right to issue execution was not the main point in issue, although it was argued in the supreme court. Valentine, J., in delivering the opinion of the court, says: "There seems to be no provision made by statute for the collection of judgments against cities of the second class. If this is so, then we suppose an execution may issue on such judgments." It does not appear to be fully decided by this case whether there are any provisions of our statute for the collection of judgments, or whether the issuing of an execution is necessary or proper in such a case. Both questions seem to be left in doubt. But in the later cases of Switzer v. City of Wellington, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196, and National Bank of Ottawa v. City of Ottawa, 43 Kan. 294, 23 Pac. 485, our supreme court has held that a city of the second class was not liable as garnishee, which is in the nature of an execution.

The usual method of collecting a judgment against a municipality being by taxation, it must be assumed in this case that the only way, if any, is by the proper officials levying a tax for that purpose. Our constitution provides (article 11, § 4): "No tax shall be levied except in pursuance of law, which shall distinctly state the object of the same; to which object only such tax shall be applied." Any authority, therefore, relied upon to support the position that the levy of a tax is authorized for that purpose, must be either express or so clearly implied as not to conflict with this constitutional provision. In his work on Public Corporations (volume 2, § 1418), Mr. Beach lays down the rule as follows: "Though a municipality cannot exceed a limitation imposed by the legislature, and can only be compelled to exercise the powers conferred upon it by the laws of the state, yet a creditor is entitled to have the whole power of the corporation exerted for the payment of a judgment; and, where a city council has a discretion as to the amount of tax which it is authorized to levy for ordinary purposes, it must, if necessary, exercise all the power which it has to pay a judgment obtained against the municipality." In support of this doctrine are the cases of Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490; Coy v. City Council, 17 Iowa, 1, 85 Am. Dec. 539; Com. v. City of Pittsburgh, 34 Pa St. 496; Iowa R. Land Co. v. Sac Co., 39 Iowa, 124.

It is a violent presumption that our constitution and statutes have left a person without remedy for the collection of a judgment obtained against a municipality where, as in this case, there is no showing that it has any property out of which such judgment can be made. In the light of the above authorities, it would seem, in the absence of a showing that the council has already levied the full amount permitted by law for general revenue purposes, that a levy for this purpose might be made under paragraph 788, Gen. St. 1889, which, so far as it is applicable, reads as follows: "To levy and collect tax for general revenue purposes not to exceed ten mills on the dollar in any one year, on all the real, mixed and personal property within the limits of said cities, taxable according to the laws of the state. The words "general revenue purposes" certainly mean the same as "ordinary purposes." Again, paragraph 793, Gen. St. 1889, provides as follows: "The council may appropriate money and provide for the payment of the debts and expenses of the city, and when necessary may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created: provided, that said bonds shall be payable in not less than ten years, nor more than twenty years from the date of their issue, and that said bonds shall bear interest at a rate not exceeding ten per cent. per annum, with interest coupons attached, payable annually or semi-annually: and provided further, that said bonds shall not be issued for the purpose of funding said indebtedness of the city, unless for every dollar of the outstanding script, orders, bonds, coupons, judgments or other evidence of indebtedness, the city shall issue in exchange therefor such bonds at dollar for dollar. The council shall levy taxes on all the property in the city in addition to other taxes for the payment of said coupons as they become due, and the taxes levied to pay the same shall be payable only in cash."

It seems clear to us that the greater power certainly includes the lesser, and that under this section, which expressly provides that the council may appropriate money for the payment of the debts and the expenses of the city including judgments, and, in so doing, may even issue bonds of said city, and then levy a tax upon all the property in the city for the purpose of paying said bonds issued to pay a judgment, they would certainly have the power to levy the tax in the first instance to pay the same judgment. In this case the amount of the demand against the city has been conclusively fixed by judgment, and its proper authorities have refused to provide any means for the payment thereof.

We are of the opinion that mandamus, which, after judgment, is wholly in the nature of an execution, was the proper remedy, and that, under the facts admitted and established in this case, the ruling of the district court granting a peremptory writ was right, and should therefore be upheld. The judgment of the district court is affirmed. All the justices concurring.

II. Quo Warranto [3]

OSBORNE v. VILLAGE OF OAKLAND.

(Supreme Court of Nebraska, 1896. 49 Neb. 340, 68 N. W. 506.)

Action by George Osborne against the village of Oakland and others. From a judgment for defendants, plaintiff appeals.

NORVAL, J. The village of Oakland was incorporated in 1881, since which time the village organization has been maintained without any attempt to form or perfect a city government, until March 14, 1896, when the board of trustees, both by resolution and ordinance, duly adopted, declared said village of Oakland to be a city of the second class, and the municipality was divided into two wards, and the boundaries thereof defined. The board of trustees having threatened to call an election to be held on the first Tuesday in April, 1896, for the election of city officers, this action was instituted to enjoin the calling or holding of such proposed election. The petition sets up the foregoing facts, and further alleges that Oakland contains less than 1,000 inhabitants. A demurrer to the petition was sustained, and the action dismissed. Plaintiff appeals.

Section 1, art. 1, c. 14, Comp. St. 1895, declares that "all cities, towns and villages containing more than one thousand and less than twenty-five thousand inhabitants, shall be cities of the second class and be governed by the provisions of this chapter, unless they shall adopt a village government as hereinafter provided." By the foregoing provision, each village in this state containing the population required by statute is a city of the second class, without any action on the part of the municipality; and it is the duty of the board of trustees to divide the territory embraced therein into not less than two wards, and call an election at the proper time for the election of city officers. State v. Palmer, 10 Neb. 203, 4 N. W. 965; State v. Holden, 19 Neb. 249, 27 N. W. 120; State v. Babcock, 25 Neb. 709, 41 N. W. 654. It follows that, if Oakland has a population of over 1,000 inhabitants, it is a city of the second class; otherwise not.

It is patent that the object and purpose of this proceeding is to test the corporate existence of Oakland as a city of the second class, and the question presented is whether injunction is the appropriate action. It is a general rule, supported by the decisions of this and other states, that equity will not grant a party relief by injunction where he has a plain and adequate remedy at law. It is likewise a well-established doctrine in this country that quo warranto is the proper remedy to in-

[3] For discussion of principles, see Cooley, Mun. Corp. § 157.

quire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. State v. Uridil, 37 Neb. 371, 55 N. W. 1072; State v. Dimond, 44 Neb. 154, 62 N. W. 498; State v. Mote, 48 Neb. 683, 67 N. W. 810; High, Extr. Rem. (3d Ed.) § 684.

An information in the nature of a quo warranto, and not a bill for injunction, is the appropriate remedy. In 2 High, Inj. § 1261, it is said: "Equity is averse to interference by injunction with the formation of local governments or municipalities in accordance with law; and, where proceedings are being had under the laws of a state for the incorporation of a village, property owners within the proposed village limits will not be permitted to enjoin such organization because the territory in question does not contain the requisite population, or because complainants would thereby be subjected to burdens of local government largely disproportionate to the benefits accruing therefrom, or upon the grounds of informality in the proceedings. Nor will the relief be allowed in such case upon the application of the attorney general, in behalf of the people of the state; and a bill for an injunction cannot be maintained to have declared null and void proceedings for the incorporation of a village under an act of legislature for the incorporation of villages, the appropriate remedy in such a case being by proceedings in the nature of a quo warranto." See 2 Beach, Inj. § 1305; Willis v. Stapels, 30 Hun, 644; People v. Minnerly, 6 Thomp. & C. (N. Y.) 318; People v. Clark, 70 N. Y. 518; Lane v. Morrill, 51 N. H. 422.

Although it is not sought to thwart the formation of a city government for Oakland, the principle underlying the above authorities is decisive of the case before us, since the purpose is to prevent the election of officers to manage the affairs of the municipality, on the ground that it has no corporate existence.

The decisions of this court cited by plaintiff do not sustain his contention that injunction is the proper action. Doubtless, an injunction will lie, in a proper case, to restrain a municipal officer from performing an act in violation of law; but that is no reason why an injunction against such an officer may be resorted to when the sole object or purpose to be accomplished is to test the validity of the corporation. In the one case, a remedy at law is afforded; while, in the other, equity alone can grant speedy and adequate relief.

It is claimed that equity will enjoin the action of municipal officers from acting in excess of the corporate power. Undoubtedly, as a general rule, this is true, but, if Oakland contains more than 1,000 inhabitants, it is an incorporated city, and it was the duty of the defendant to call an election for city officers. To determine that the defendants were about to proceed unlawfully in calling the proposed election would

require us to judicially ascertain whether Oakland is a village or city, and that cannot be done in this form of action. The judgment dismissing the petition is right, and it is affirmed. Affirmed.

III. Certiorari [4]

In re WILSON.

(Supreme Court of Minnesota, 1884. 32 Minn. 145, 19 N. W. 723.)

Application for writ of certiorari to determine the validity of an ordinance passed by the city council of the city of Minneapolis regulating the sale of intoxicating liquors.

MITCHELL, J.[5] * * * Originally, and in English practice, a certiorari was an original writ, issuing out of the court of chancery or king's bench, directed to the judges or officers of an inferior court, commanding them to certify or return the records or proceedings in a cause before them, for the purpose of a judicial review of their action. In the United States the office of this writ has been extended, and its application is not now confined to the decisions of courts, properly so called, but is also used to review the proceedings of special tribunals, commissioners, magistrates, and officers of municipal corporations exercising judicial powers, affecting the rights or property of the citizen, when they act in a summary way, or in a new course different from that of the common law.

The acts of municipal corporations, or rather of municipal officers, are divided into legislative, ministerial, and judicial. Of course, municipal officers do not, strictly speaking, possess judicial powers; but they do possess certain powers, in the exercise of which they perform acts which, both from the nature of the acts themselves and their effect upon the rights or property of the citizen, bear a close analogy to the acts of courts, and are, therefore, termed "judicial," or "quasi judicial," to distinguish them from those that are merely ministerial or legislative. The authorities are almost uniform in holding that mere legislative or ministerial acts, as such, of municipal officers cannot be reviewed on certiorari; that only those which are judicial can be thus reviewed. The courts are not always agreed as to what acts are judicial. Some have gone a great length in holding certain acts judicial, which, on principle, it would be very difficult to place under that head.

[4] For discussion of principles, see Cooley, Mun. Corp. § 158.

[5] Part of the opinion is omitted and the statement of facts is rewritten.

But in every case which we have found where a court has assumed the right to review the acts of municipal officers on certiorari, either the act itself was judicial in its nature, or else its validity was involved in judicial proceedings which were the subject of review. The following are instances of acts of municipal officers which have been held judicial, and hence directly subject to review on certiorari: Laying out a street or highway across private property, and assessing the owners' damages therefor; making special assessments against a man's property to pay for improving or paving a street; assessing damages for the destruction of buildings to prevent the spread of fire; determining contested election cases. All these bear more or less analogy to the judicial acts of courts, properly so called. But we doubt whether in any case it has ever been held that a purely legislative act, as such, can be reviewed on certiorari.

Cases from New Jersey have been cited as going that far. The courts of that state have probably extended the application of this writ further than those of any other state; but our attention has not been called to any case, even from that state, which goes as far as counsel claim. The cases of Camden v. Mulford, 26 N. J. Law, 49, and Carron v. Martin, 26 N. J. Law, 594, 69 Am. Dec. 584, cited by petitioner, do not go to any such length. All that was decided in the first case was that an ordinance authorizing a new improvement to be made, such as opening and paving new streets, and constructing sewers, by which the property of specific individuals may be directly taxed to defray the expense, was a judicial act. In the second case it was merely held that the supreme court had a right to review on certiorari the proceedings of corporations that do acts affecting the rights and property of individuals, which are judicial or quasi judicial in their nature.

Dill. Mun. Corp. § 926, is also cited as authority that courts will on certiorari examine the proceedings of municipal corporations, whether legislative or judicial. But that learned author does not say so. He is simply stating the rule that certiorari will lie to review the proceedings of such corporations. But that he did not intend to convey the idea that mere legislative or ministerial acts could be thus reviewed is evident, for at least two reasons: First, not a single authority cited in support of the text sustains such a proposition. Second, the author immediately adds, by way of illustration: "Thus if no appeal or other mode of review be given, and if there be no statute to the contrary, the legality of convictions in municipal courts will be reviewed on certiorari. So, under the same circumstances, and in the same way, the proceedings of municipal corporations in opening streets, in making local assessments, in levying taxes, in contested election cases, and the like, will be examined and reviewed to ascertain whether they are regular and legal," all of which, it will be found from an examination of the cases cited, have been held to be judicial acts.

To hold that any mere legislative act of a municipal corporation could be thus directly reviewed on certiorari would not only be a radical departure from all precedent, but extremely onerous upon the courts and vexatious to municipal officers. There is no more reason why the validity of a legislative act of a city council should be thus raised in advance of actual litigation between parties, involving the question, than there is in the case of an act of the legislature. That the ordinance under consideration is a legislative act needs no argument. The suggestion that it is judicial, because the city council must have exercised their discretion in passing it, is without force. Every legislative act calls for the exercise of discretion as to its expediency and propriety. Writ denied.

IV. Injunction [6]

INTERNATIONAL TRADING STAMP CO. v. CITY OF MEMPHIS.

(Supreme Court of Tennessee, 1898. 101 Tenn. 181, 47 S. W. 136.)

Application of the International Trading-Stamp Company and others against the city of Memphis and the city council for an injunction. The writ was granted; a demurrer to the bill was overruled; and a motion to dissolve the injunction was refused. On failure of complainants to furnish increased bond, the injunction was dissolved. From the decree overruling the demurrer, defendants appeal.

WILKES, J. The complainant stamp company and certain merchants doing business in Memphis filed this bill against the city council and city of Memphis seeking to enjoin the passage of an ordinance pending before the council imposing a privilege tax upon the company of $500, and upon each merchant of $250, for engaging in what is styled the "trading-stamp business," and declaring the doing of such business without license a misdemeanor upon the part of the company and the merchants. An injunction was granted, and served upon the members of the council. The defendants moved to dissolve the injunction, and also demurred to the bill on various grounds. The chancellor overruled the demurrer, and refused to dissolve the injunction. On motion, the penalty of the bond was increased to $10,000, and complainants declined to give it, and the injunction was dissolved. From the decree overruling the demurrer, the chancellor granted an appeal to the defendants, and they have assigned errors.

[6] For discussion of principles, see Cooley, Mun. Corp. § 161.

While the errors assigned are eight in number, only one question is presented, and that is whether a court of chancery should enjoin a city council from passing such an ordinance under its legislative power. It is conceded that a court of chancery may restrain the enforcement of an illegal or ultra vires ordinance after it is passed. Bradley v. Commissioners, 2 Humph. 428, 37 Am. Dec. 563; Lynn v. Polk, 8 Lea, 127; Public Ledger Co. v. City of Memphis, 93 Tenn. 81, 23 S. W. 51; Deems v. Mayor, etc., of Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339.

It is insisted that this ordinance, if passed, would be ultra vires and void, because it attempts to create a privilege, and tax it, and make its pursuit without payment of tax a misdemeanor, when the legislature has not so provided. The contention is that the legislature alone can create a privilege, and authorize its taxation, and that a municipal corporation cannot make any occupation a privilege, nor impose a tax upon it, unless it has first been so declared by the legislature. This, we think, is correct. Mayor, etc., v. Althrop, 5 Cold. 554, 558, 559; Fulgum v. Mayor, etc., 8 Lea, 640.

It is insisted that the legislature has not made the trading-stamp business a privilege, nor imposed a tax upon it, and an attempt to do so by the city council of Memphis would be an act ultra vires and beyond its power, and that such action may be enjoined to prevent irreparable mischief and damage. It appears that the legislature, at its special session in 1898, did pass a bill declaring that trading-stamp agencies and merchants doing business by or through such agencies should pay a tax for such privilege; and the bill is published as an act of the extra session of 1898. But it appears from the journals of the house that the bill was vetoed by the governor as unconstitutional, and was not passed over his veto; so that it has no force or vitality, and is improperly published as an existing law.

It is next contended that under section 4, c. 84, Acts 1893, the city of Memphis was empowered to levy privilege taxes, and hence the legislative council was acting within the scope of its authority. This section is as follows: "Sec. 4. Be it further enacted, that from and including the year 1893, power is hereby conferred upon the legislative council of the city of Memphis to levy and impose all necessary taxes for the support of the government of said city. In the exercise of said power the legislative council shall always levy and impose a sufficient tax to pay the interest of the outstanding bonds of said city, and to provide a sinking fund for the retirement of the bonds themselves, as required by the law under which said bonds were issued. * * * The power conferred thus to impose taxes shall apply to every object and subject of taxation within the corporate limits of the city of Memphis. Said power shall extend to every species of property and to privileges and wharfage dues, and all other things upon which the legislature or the city has heretofore laid taxes, rates or assess-

ments for the support and maintenance of said government, the object being to provide for the exercise of the power herein conferred under the restrictions named as fully as the same could be exercised if the legislature and not the city were exercising the power."

It is evident that the power conferred by this act was to tax such property, privileges, and other things as had been theretofore taxed, or thereafter ordered to be taxed, by the legislature, or the city under authority of the legislature; but it did not confer the power to create new privileges, and assess taxes for their exercise, and, as we have already seen, no such power exists independent of legislative authority. It clearly appears, therefore, that the contemplated action of the council was illegal and ultra vires; and the question recurs, should complainants be allowed to enjoin the enactment of the ordinance, or take their remedy to prevent its enforcement after it is passed? In the case of Public Ledger Co. v. City of Memphis, 93 Tenn. 81, 23 S. W. 51, this court said: "The remedy by injunction to prevent municipal corporate action is one not lightly to be applied. If the matter complained of is one merely of simple contract, of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for the use of the writ at the instance of the taxpayer." But there is a broad distinction between the exercise of legislative authority when the power or jurisdiction to exercise it has been conferred by law and an attempt to legislate upon matters clearly ultra vires. Where there is power and authority conferred by law to do any legislative act, the discretion of the council cannot be controlled; but, when there is no legislative authority or power, injunction will lie. A municipal corporation has no discretion to do any act which is clearly illegal and beyond its power. Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; Roberts v. City of Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844; High, Inj. § 1241, and cases cited; People v. Dwyer, 90 N. Y. 402; Murphy v. East Portland (C. C.) 42 Fed. 308.

It is said, however, conceding that injunction will lie, it should not be resorted to so long as the complainant has other sufficient remedies, such as an action for damages, or an action to enjoin the enforcement of the ordinance when passed; and this is undoubtedly so. The legislation proposed is to impose a tax of $500 upon the stamp company, and $250 on each merchant using the stamps, and to make the violation of the ordinance a misdemeanor. It is alleged there are a number of these merchants,—145 or more. With these merchants the company has a contract for a year, which must be breached if the law is observed, and thus ground will be laid for a large number of suits. Moreover, the use of the stamps being made a misdemeanor, the merchants would each be liable in a criminal action if he did not break the contract. Each breach would perhaps be a separate de-

tinct offense for which the penalty could be demanded, at least until the question was settled on appeal. To restrain the enforcement, an action would have to be brought by each person liable; so that we think a proper case is made out to enjoin the passage of the act, and the decree of the court below is affirmed, with costs.

OSBORNE v. VILLAGE OF OAKLAND.

(Supreme Court of Nebraska, 1896. 49 Neb. 340, 68 N. W. 506.)

See ante, p. 347, for a report of the case.

QUASI CORPORATIONS

I. Distinguishing Elements [1]

BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS.

(Supreme Court of Ohio, 1857. 7 Ohio St. 109.)

See ante, p. 4, for a report of the case.

ASKEW v. HALE COUNTY.

(Supreme Court of Alabama, 1875. 54 Ala. 639, 25 Am. Rep. 730.)

See below, for a report of the case.

MILLS v. WILLIAMS.

(Supreme Court of North Carolina, 1850. 33 N. C. 558.)

See ante, p. 1, for a report of the case.

II. Counties [2]

ASKEW v. HALE COUNTY.

(Supreme Court of Alabama, 1875. 54 Ala. 639, 25 Am. Rep. 730.)

BRICKELL, C. J.[3] The argument in support of the first and third counts, is the same substantially, and may be thus stated: Counties are municipal corporations, charged with the ministerial duty of keeping in repair the public roads and bridges, so that they shall be safe and commodious ways, for the passage of the public. The law imposing the duty, for misfeasance or nonfeasance in its performance, from which injury ensues to an individual, an action will lie. In support of the argument reference is made to many of the numerous authorities, which hold municipal corporations enjoined to keep streets, and bridges, parts of the streets, in repair, and supplied with the

[1] For discussion of principles, see Cooley, Mun. Corp. §§ 163-165.

[2] For discussion of principles, see Cooley, Mun. Corp. § 166.

[3] Part of the opinion is omitted.

means of performing the duty, are liable for injuries resulting from the non-performance, or the unskillful and negligent manner of performance.

A radical error, fatal to the argument, is in treating the county as a municipal corporation. It has corporate characteristics, but it is not a municipal corporation, though often so termed. It is an involuntary political or civil division of the state, created by statute to aid in the administration of government. It is in its very nature, character and purposes, public, and a governmental agency, or auxiliary, rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statute creating it. It is created mainly for the interest, advantage, and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more beneficently to exercise over them its powers. All the powers with which the county is entrusted, are the powers of the state, and all the duties with which they are charged, are the duties of the state. If these were not committed to the county, they must be conferred on some other governmental agency. The character of these powers, so far as counties in this state are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges and ferries, the compensation of jurors, attending the state courts, and the supervision of convicts sentenced to hard labor, as a punishment, for many violations of the criminal law, it is the general policy of the state to entrust to the several counties, and are all but parts of the power and duty of the state. These powers could be withdrawn by the state, in the exercise of its sovereign will, and other instrumentalities or agencies established, and clothed with them. Soper v. Henry County, 26 Iowa, 267; Hamilton County v. Mighels, 7 Ohio St. 109; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; 1 Dill. Mun. Corp. §§ 10–39. * * *

BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS.

(Supreme Court of Ohio, 1857. 7 Ohio St. 109.)

See ante, p. 4, for a report of the case.

MILLS v. WILLIAMS.

(Supreme Court of North Carolina, 1850. 33 N. C. 558.)

See ante, p. 1, for a report of the case.

III. Torts [4]

MARKEY v. QUEENS COUNTY.

(Court of Appeals of New York, 1898. 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.)

Action by Kate Markey, administratrix of Hugh Markey, deceased, against the county of Queens and the city of Brooklyn. From a judgment of the appellate division (9 App. Div. 627, 41 N. Y. Supp. 1123), affirming a judgment sustaining a demurrer, plaintiff appeals.

GRAY, J.[5] Plaintiff's intestate lost his life through the breaking down of a bridge over Newtown creek, and this action was brought to recover damages of the defendants, the county of Queens and the city of Brooklyn, for their alleged negligence with respect to the condition of the bridge. A bridge had long existed over Newtown creek, which was the boundary line between the counties of Kings and Queens; and, pursuant to an act passed in 1892, the boards of supervisors of these counties had made a contract for its reconstruction. Meanwhile, a temporary foot bridge, for the accommodation of foot passengers during the progress of the work, was erected, and made use of by the public. The plaintiff alleges that this temporary bridge was insufficient, out of repair, inadequate for its purposes, and not calculated to bear the strain to which it would be subjected, and that the defendants were negligent in permitting its use by the public in that condition. The county of Kings, under chapter 954, Laws 1895, became absorbed on January 1, 1896, into the city of Brooklyn, which was therefore made a defendant. The county of Queens, the other defendant, demurred to the complaint, for not stating facts sufficient to constitute a cause of action against it. The demurrer was sustained at the special term and at the appellate division of the supreme court, in the Second judicial department, which latter court has certified the case to us, as involving a question of law which ought to be reviewed by this court. That question, broadly, is whether, by any rule of law, as established in this state, a county may be held liable at the suit of a private individual who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable.

The question is one of considerable interest, and, beyond the general discussion, demands an interpretation of the provisions of the county law of 1892 (Laws 1892, c. 686), the second section of which declares the county to be a municipal corporation. The provision

[4] For discussion of principles, see Cooley, Mun. Corp. §§ 161, 173.

[5] Part of this opinion and all of the dissenting memorandum of Bartlett and Martin, JJ., are omitted.

is as follows: "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law." By the third section, it is provided that: "An action * * * to enforce any liability created, or duty enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the county." It is argued that the county, being thus declared a municipal corporation and being charged by law with the duty of maintaining the bridge, is made subject to those liabilities which it was understood the law attached to that class of corporations for breaches of duty. It is urged that as counties never were known, before this statute, as municipal corporations, the legislature, in its enactment, must have intended that they should be treated as upon a par with cities, when engaged in similar transactions, and that this proposition should be sustained from the point of view of public interest.

In considering the question before us, we must not fail to observe that the language of section 3, above quoted, seems to import no further liability than that which was then existing. The only portion of that section which is material to the case is that which provides for an action "to recover damages for any injury to any property or rights for which it is liable." In other words, what the legislature appears to have done was to provide that, where the county is liable for an injury, the action shall be in the name of the county. If, prior to the passage of the county law, the county was not liable for such an injury as was sustained in the present case, did it become so thereafter, by implication from the language of the second section, as argued for the appellant, in the use of the words "municipal corporation," or by reason of the third section?

To a clear understanding of the question, it may be well to consider what was the legal status of counties of this state, and then, incidentally, what is that of a municipal corporation proper, such as an incorporated city. The civil divisions of a state into counties had their origin in England, where, preceding the organization of the kingdom itself, they were thereafter continued, from recognized necessities in government, as other countries had their departments or their provinces. In such divisions, it was found that the purposes of local government and of the administration of justice were promoted. Differing from England in their origin, in this country they were first created by the legislatures of the various colonies, and subsequently by the states of the Union. They were invested with such corporate attributes as were essential to a proper performance of the duties of local government. They were, in effect, subdivisions of the governed territory, established for the more convenient administration of government and having such powers as were

necessary to be exercised for the welfare, advantage, and protection of the public within their boundaries. While in the people resided the sovereign right to declare the general mode of their government, it was the appropriate duty of their legislative body to so arrange the territory of the state into civil divisions, and to so apportion among them governmental duties, as would best conduce to the advantage of its citizens.

By the common law of England, a county, though sometimes regarded as a quasi corporation, could not be subjected to a civil action for a breach of its corporate duty unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it, but the only remedy for a breach of that duty was by presentment or indictment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as a subject of a popular action, and not of a private action. In Russell v. Men of Devon, 2 Term R. 667, which was an action by an individual against the inhabitants of a county for an injury sustained through the defective condition of a county bridge, it was held that they were not such a corporation, or quasi corporation, against whom such an action could be maintained. It was reasoned that, while the inhabitants of the county might be a corporation for some purposes, no statute had authorized such an action, and that the action would be one against the public.

The authority of that case, as settling the rule at common law that no civil action could be maintained for an individual injury in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country. I may refer in particular to the case of Bartlett v. Crozier, in this state (17 Johns. 439, 8 Am. Dec. 428) and to the cases in Massachusetts of Riddle v. Proprietors, etc., 7 Mass. 169, 5 Am. Dec. 35, and Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63, and to the very thorough discussion of the cases in England and in the United States, which will be found in Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332, and in chapter 23, 2 Dill. Mun. Corp. I think it, however, sufficient to confine the present discussion to what the statutes and decisions of this state require us to hold upon the question.

In this state, its division into counties or sections for the purposes of local government was but a continuance of a method which, while a colony, it had adopted from England. By the constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If, under the common law, counties could not be subjected to private actions for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions, unless the common law in that respect has been changed by statute. Where a principle of the

common law has entered into our form of government, it is controlling, until by legislation, express in its terms, it is modified, or negatived by the substitution of a new declaration upon the subject. The only statute for which that could be claimed is the county law of 1892, which heretofore I have referred to.

Having regard to the fact that counties were created such for the better and more convenient government of the state, both upon authority and upon principle, in the exercise of those political powers which appertain to local government, and which are for the public benefit, they should be no more liable for damages resulting therefrom, at the suit of a private individual, than would be the state itself. The counties and towns of this state were always bodies corporate for certain purposes; having been endowed with capacities to purchase and to hold real and personal property, and to make contracts in reference thereto. Rev. St. pt. 1, art. 1, tit. 1, cc. 11, 12. The corporate powers were of defined and limited extent, and in all other respects which concern governmental duties, included among which was the conservation of highways, roads, and bridges, they were merely divisions organized for the convenient exercise of portions of the political power of the state. Lorillard v. Town of Monroe, 11 N. Y. 392, 62 Am. Dec. 120. The common-law rule which rested the duty of caring for and repairing highways and bridges upon the counties did not obtain in this state. That duty was confided to the officers of towns. But special acts were passed from time to time, whereby the burden has been shifted so as to be imposed, either upon two or more towns, or upon the county, or upon both counties and towns. Hill v. Supervisors, 12 N. Y. 52. In the county law of 1892, it was provided that where a bridge spans any of the navigable tide waters of this state, as in the present case, forming a boundary line betwen two counties, the expense of its maintenance is made an equal charge on the two counties in which the bridge is situated. Section 68.

Whether the maintenance of highways and bridges is devolved as a duty upon the towns or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental. Lorillard v. Town of Monroe, supra. There is no distinction to be made between highways and bridges, in the matter of the duty. A public bridge is a public highway. Ang. Highways, § 40. Its maintenance is quite as much a governmental duty towards the public within the territory of the state, and the principle that the state holds its highways in trust for the public is applicable. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336. This is especially true where a bridge is necessary to cross the navigable waters of the state, but it is true under all circumstances. In People v. Rensselaer & S. R. Co., 15 Wend. 113, 134 (30 Am. Dec. 33), it was said by Savage, C. J.: "There can be no question, therefore, that the state legislature has the power to build bridges, where they shall be necessary for the

convenience of its citizens. * * * It is the duty of the state governments to afford their citizens all the facilities of intercourse which are consistent with the interests of the community." To charge the duty of building and maintaining a bridge over navigable waters upon the boards of supervisors of counties was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit, and in its exercise they acted as the agents for the public at large.

The state, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway, and its performance might properly be delegated to the officers of the particular civil division. The corporate body of Queens county derived no especial advantage from it in its corporate capacity, and, if that be true, it should not be liable for the negligent acts of the board of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be as exempt from a private action as would be the state itself. In People v. Supervisors, etc., 142 N. Y. 271, 36 N. E. 1062, we expressly held that the power conferred upon the counties of Kings and Queens with respect to this work was in the public interests, and for the public benefit. As lately as in the case of Hughes v. County of Monroe, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33, where it was sought to hold the defendant liable for injuries sustained by the plaintiff while operating a steam mangle in the laundry of an insane asylum, the doctrine was plainly asserted of the nonliability of counties and of other municipal corporations for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty. This doctrine of nonliability, resting as it does upon the principle that the grant of power is to the county in its political character, and as a means of the exercise of the sovereign power in measures of public interest and for the public benefit, is illustrated in various decisions of this court where the question arose as to the liability of a city for corporate acts resulting, through a negligent performance, in injury to individuals.

With respect to such a municipal corporation proper as a city, the rule of law is well settled by frequent adjudications that the grant by the legislature of a city charter authorizing and requiring a city to perform certain duties renders it liable to a private action for neglect in their performance, when a county or town would not be so liable. A distinction exists between such a corporation, which is created by charter, and is granted the power to own and to manage private property, and is invested with particular franchises, and a municipal corporation, which is created for the purposes of state government, and to exercise, as one of its civil divisions, certain of its political powers. In the case of the former, its responsibility depends upon the nature of the powers exercised * * *

I think that the principle of our decision must necessarily be this: That as the counties of this state were bodies corporate, for certain specific purposes, before the enactment of the county law of 1892, now that they are declared thereby to be municipal corporations their liability for corporate acts is no further enlarged than what may be clearly read in, or implied from, the statute. Their becoming municipal corporations in name imports no greater liability, because by the third section of the law their liability for injuries is confined by the language to that which was existing. The liability remains as it was,—neither greater nor less. No new duty or burden has been imposed upon counties in respect to the maintenance of bridges over navigable boundary streams. The duty which always existed for public purposes and for the public benefit is continued. The work of maintaining the bridge in question was properly charged upon the counties, because it could be more advantageously performed by them than by the towns. Towns themselves were not liable for damages arising from defective highways and bridges until, by an act of the legislature in 1881, the liability which formerly rested upon the commissioners of highways was transferred to them. If it was necessary, in order that towns might be made liable in private actions, that there should be such legislation, it is as necessary, I think, that there should be some express legislation, in order to impose the liability upon a county which did not previously exist. The object of the county law of 1892, in my judgment, in declaring the county a municipal corporation, was in order that it might be sued as a legal entity in cases where previously actions were maintainable only in the name of the board of supervisors. * * *

The conclusion I have reached after a careful consideration of the subject is that in the work of construction of this bridge the board of supervisors were executing a certain public duty, imposed upon them as the proper public agents in that particular civil division of the state, and that the county could not be subjected to a private action for injuries occurring in, or by reason of, the performance of the work. I do not think it is consonant with the reason of the rule of law which concedes to the sovereign power in government an exemption from liability that a private individual may have a right of action against those who have but exercised a lawful power which was vested in them by the legislative body for the public convenience and welfare, and not for any private benefit of the corporate body. The judgment appealed from should be affirmed, with costs.

FRY v. ALBEMARLE COUNTY.

(Supreme Court of Appeals of Virginia, 1889. 86 Va. 195, 9 S. E. 1001, 19 Am. St. Rep. 879.)

LACY, J. This is a writ of error to a judgment of the circuit court of Albemarle county, rendered on the 14th day of May, 1888. The plaintiff in error here filed her petition before the board of supervisors of Albemarle county on the 25th day of July, 1887, representing that she came to Charlottesville, in a buggy drawn by one horse, on the 21st day of April, 1887, from a point in the county of Albemarle, in company with another lady who was riding in the same buggy. In the afternoon, about 4:30 p. m., on their way home, they were driving along one of the public roads of Albemarle county, going cautiously and carefully down a hill, when they came to a point where the public road was being worked on by a chain-gang, composed of convicts out of the state-prison, or Penitentiary House at Richmond, organized by the county of Albemarle by authority of an act of assembly in that case made and provided; when, seeing a cart with a mule hitched to it moving up the hill with one of these convicts walking by the side of the cart, they turned out of the way on their righthand side as far as they could, and stopped, and called out to the convict to look to the mule; that he was very slow to do this, and so slow and negligent about it that the cart collided with the buggy, and turned it, together with its occupants, into the ditch on the road-side, and hurt the petitioner very much, by which she had been caused suffering and loss in physician's fees, and other expenses, and that she believed herself to be permanently injured; that this convict was an employé of the county of Albemarle, and that the county was therefore liable in damages for these personal injuries inflicted upon her by the county's servant, and she demanded $5,000 for the same.

This claim the board of supervisors rejected, and she appealed to the county court, when her petition was again rejected, and thereupon she appealed to the circuit court for the said county, when the judgment of the county court was affirmed, whereupon she brought the case here by writ of error. The petition was rejected in the county court upon demurrer; so all we have to consider here is the single question whether the petition presents a case for which the county of Albemarle is liable to answer in damages.

The decision of the lower courts in this case is founded upon the principle that the sovereign cannot be sued except by its own consent, as may be provided by law; and that in the exercise of its sovereign power it is liable neither for misuser nor nonuser, and that a county in this state is a political subdivision of the state for governmental purposes as prescribed by public law, and is no more than the state liable to be sued for its public acts, and that it cannot be

held chargeable for the acts of an officer whose duties are fixed and prescribed by law.

Suits against the state are allowed by law under certain regulations, and, in certain specified and enumerated cases, counties in this state are authorized to sue and are suable in the circuit court held for such county in their own names, but these are limited. The thirteenth section of chapter 45 of the Code of 1873 provides that "counties may sue in their own names for forfeitures, fines, or penalties given by law to such counties, or upon contracts made with them, and may be sued in their own names, in the circuit court of such county."

The legislature has given a remedy in cases growing out of contracts with counties, but it has given no remedy against a county for the negligence of a public officer or servant appointed by law, and we may observe, as did Lord Kenyon long ago, that the question here is "whether this body of men, who are sued in the present action, are a corporation, or qua a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose." Russell v. Men of Devon, 2 Term R. 671. "And even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy."

The rules established by the courts concerning municipal corporations have but slight application to counties organized as ours are. Our counties are parts of the state; political subdivisions of the state; created by the sovereign power for the exercise of the functions of local government. As was said by a learned judge in a case not now modern, counties are "at most but local organizations, which, for purposes of civil administration, are invested with a few functions characteristic of a corporate existence. * * * They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them." Board v. Mighels, 7 Ohio St. 109.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of its locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and of transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy (opinion of Brinkerhoff, J., in same case).

In that case it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commis-

sioners of the county in the discharge of their official duties; and the court said: "But it is said the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners, but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasance in office of the sheriff, or for the official defalcations of the county treasurer? * * * We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect," even if the neglect be such as would create a civil liability against a natural person or a municipal or private corporation. "It is," he adds, "undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners; * * * but this has not yet been done, and we think that such liability cannot be derived from the relation of the parties either on the principles or the precedents of the common law." See, also, Jacobs v. Hamilton Co., 4 Fish. Pat. Cas. 81, Fed. Cas. No. 7,161; Soper v. Henry Co., 26 Iowa, 264; Treadwell v. Commissioners, 11 Ohio St. 190; Ang. & A. Corp. §§ 14, 23–25; Dill. Mun. Corp. §§ 9, 32, 39, 761, 762.

In this case the county of Albemarle is sued to recover damages resulting from the alleged negligence of a state convict engaged in working on the public roads of the state,—the public highways in the county of Albemarle belong to the commonwealth, not to the county,—and of the alleged negligence of a superintendent who was appointed by the authority of a state law.

No suit can be maintained against the county of Albemarle upon the principle of respondeat superior, because the relation of master and servant did not exist. Such officers are quasi public officers of the state; for, although the officer in charge was appointed by the county, yet the office and duties incident to it were created by an act of the legislature, for the general public welfare; the public roads of Albemarle county being highways of the commonwealth for the common benefit of all the people of the state who have a right to use them.

We have been referred to numerous decisions concerning the character of the duty required of these and other officials similarly situated, drawing a distinction where the duty is for the benefit of the general public and where it is for the benefit of a corporation, but we do not cite them. They are more distinctly applicable to municipal corporations proper than to such organizations as counties, which are rather political subdivisions of the state, or, as sometimes denominated, "quasi corporations."

Upon reason, as well as upon authority, we are clearly of opinion that the judgment of the circuit court affirming the judgment of the county court of Albemarle was plainly right, and the same will be here affirmed.

IV. County Bonds [6]

CLAIBORNE COUNTY v. BROOKS.

(Supreme Court of the United States, 1884. 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470.)

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

BRADLEY, J.[7] This was an action of debt, brought by the appellee, (the plaintiff below,) as bankrupt assignee of Howard, Cole & Co., against the county of Claiborne, Tennessee, on its bond or obligation, dated the seventh day of April, 1868, payable to one V. H. Sturm, or order, for $5,000, with interest, and indorsed by Sturm to Howard, Cole & Co. * * *

The case was commenced in the state court and was removed into the circuit court of the United States, and came up for trial on the pleas of non est factum, nil debet, and payment, other pleas having been overruled on demurrer. A verdict being rendered in favor of the plaintiff under the charge of the court, and exceptions being taken to the charge, the case is brought here by writ of error. * * *

The following sections of the Code of Tennessee show the powers of counties in that state in relation to the erection of public buildings, and the making of contracts:

Sec. 402. "Every county is a corporation, and the justices in the county court assembled are the representatives of the county, and authorized to act for it."

Sec. 403. "Suits may be maintained against a county for any just claim as against other corporations."

Sec. 404. "Each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the management, control, and improvement thereof, and for the better exercise of its civil and political power; may do such other acts, and exercise such other powers as may be allowed by law."

Sec. 408. "It is the duty of the county court to erect a court-house, jail, and other necessary county buildings."

Sec. 410. Such buildings "shall be erected within the limits of the county town."

[6] For discussion of principles, see Cooley, Mun. Corp. § 180.

[7] Part of the opinion is omitted.

Sec. 411. "The county buildings are to be erected, and kept in order and repair at the expense of the county, under the direction of the county court, and it may levy a special tax for that purpose."

Sec. 414. [Confers power on the justices of the county court, when deemed for the public interest, to change the site of the county jail or court-house, and to order a sale of the site or materials;] "and they may also order that a more eligible, convenient, healthy, or secure site be purchased, and cause to be erected thereon a new jail or court-house, better suited to the convenience of said town, and secure the safe custody, health, and comfort of the prisoners." * * *

From the instructions requested by the defendant and those given by the court (although there is a want of explicitness in the bill of exceptions) we gather that the real controversy was, whether the defendant could set up against the assignees of the bond a defense (such as payment) which would have been good against Sturm, the original holder, as to whom evidence was given tending to show that he had received from the county all, or nearly all, that he was entitled to, independently of the bond sued on. Unless this was the real controversy, we do not see the relevancy of the charge. For if the right of the defendant to set up the defense, which it had against the bond in the hands of Sturm, was not denied or disputed, we do not see of what importance the particular form of the instrument would have been. But if the form was relied on as precluding any such defense, then the charge was clearly material, and had a decisive bearing upon the case.

The doctrine of the charge is that the power of a county to erect a court-house involves and implies the power to contract for its erection; and the power to contract involves and implies the power to execute notes, bonds, and other commercial paper as evidence or security for the contract; or, to state it according to its legitimate conclusion and result, it is this, that whenever a county has power to contract for the performance of any work or for any other thing, it has incidental power to issue commercial paper in payment thereof; that the one power implies the other. It being clear that the county of Claiborne had power to erect a court-house, the court below held that this involved an implied power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof.

We cannot concur in this view. The erection of court-houses, jails, and bridges is among the ordinary political or administrative duties of all counties; and, from the doctrine of the charge, it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes, and other commercial paper in payment of county debts and charges; and if they have this power, then such obligations, issued by the county authorities and passing into the hands of bona fide holders, would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be in the

power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it.

Our views on this subject were distinctly expressed in the case of Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251, where, speaking of the power of local political bodies to issue commercial paper, we said: "It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated. We do not mean to be understood that it requires in all cases express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in future." Pages 571, 572. In that case the suit was brought on coupons of bonds given to take up certain levee warrants issued by the police jury of the parish; and the court were unanimously of opinion that the police jury had no power to issue such bonds.

In the subsequent case of Mayor of Nashville v. Ray, 19 Wall. 468, 22 L. Ed. 164, the circumstances were somewhat different. That was the case of an incorporated city, and the suit was brought on treasury warrants drawn by the mayor and recorder on the city treasurer, payable to bearer, and originally delivered to various persons for work done for the city; they were afterwards received by the tax collector in payment of taxes, and then sold for such price as they would bring to raise money for city purposes; the plaintiff had purchased the warrants in suit, and evidence was given to show that he had notice that they had been paid in and received for taxes; but the court below

held that the corporation had the right to issue promissory notes and other securities; and that if it was the usage to reissue them in this way, they would, when sold and reissued, be obligatory on the city. All the justices of this court held that, when originally issued, they were valid as vouchers and evidences of actual indebtedness, and the three dissenting justices held with the court below that they were valid obligations when reissued; but a majority of the court concurred in reversing the judgment, and four of the justices were of opinion that, as the city had no express power to borrow money or to issue commercial paper, and, in their view, no general power by which it was necessarily implied, the warrants when once paid in for taxes were nothing but redeemed vouchers, and functus officio, and ceased to have any validity, and that the city officers had no authority to reissue them; that it was an unauthorized use of the city's credit, and an attempt to borrow money and to issue commercial paper without any power or authority to do so; and that the plaintiff's claim of being a bona fide holder could not avail him.

In discussing the subject the following remarks were made, which were quoted with approval in the subsequent case of Wall v. County of Monroe, 103 U. S. 78, 26 L. Ed. 430: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose." And again: "Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a bona fide holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take cum onere, and are affected by the same defect."

The counsel for the defendant in error relies strongly on the case of Lynde v. County of Winnebago, 16 Wall. 6, 21 L. Ed. 272, decided

by this court, and State v. Anderson County, 8 Baxt. (Tenn.) 249, decided by the supreme court of Tennessee, as well as upon various decisions of other state courts, particularly Williamsport v. Com., 84 Pa. 487, 24 Am. Rep. 208; Mills v. Gleason, 11 Wis. 470; and Bank of Chillicothe v. Chillicothe, 7 Ohio, pt. 2, p. 31, 30 Am. Dec. 185.

Conceding that views different from those which we have expressed are entertained by some of the state courts, and that they may be controlling in the states where they are thus entertained, we are more especially concerned to know what is held to be the law in Tennessee, as well as what may have been held in the decisions of this court in former cases.

In the case of Lynde v. County of Winnebago, the county had express legislative authority to borrow money for the erection of public buildings, to be determined by the people of the county at any regular election or special election called for the purpose. The question in the case was not as to the existence of the power, but as to the effect of the evidence on the question whether the conditions for its exercise had been complied with. The court held that the evidence was sufficient, and sustained the bonds. It was not pretended that the county would have had power to issue them if such power had not been conferred by the legislature, either expressly or by necessary implication, from the express power to "borrow money."

In the case of State v. Anderson County the authority to issue bonds was still more explicit. An act of the legislature of Tennessee, passed in 1852, (chapter 191,) had authorized certain counties to subscribe stock in any chartered railroad located through said counties, in any amount determined upon, in the manner prescribed by law, and to issue bonds for the amount subscribed. Another act, passed in 1854, applied these provisions expressly to Anderson county, and the bonds in question in that case were issued in pursuance of this act, although the preliminary proceedings had been taken under a different act, which authorized a subscription to the stock, but did not expressly authorize the issue of bonds therefor. The supreme court of Tennessee, it is true, expressed an opinion that authority to issue the bonds was implied from the power given to subscribe for stock, without the aid of the act of 1854, stating, as a general rule, "that a county, like another corporation, having right to create a debt, has also the incidental right to issue the commercial evidence of it, in such forms as may be satisfactory to the parties." But the statement of this general proposition may be regarded as only a dictum in the case, since the judgment was fully supported by the express provisions of the act of 1852, c. 191, if not by the power given to subscribe for stock in a railroad corporation. We are not referred to any other decision of the supreme court of Tennessee which comes any nearer to a determination of the question.

It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political

and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state. But as all, or nearly all, the states of the Union are subdivided into political districts similar to those of the country from which our laws and institutions are in great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local state statutes or decisions to the contrary, to interpret their general powers in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state, and physical surroundings.

With regard to the political divisions of counties and townships, we have heretofore, in the cases referred to, expressed our views as to their power of issuing paper obligations of a commercial character. We consider such a power as entirely foreign to the purposes of their creation, and as never to be conceded except by express legislation, or by necessary, or, at least, very strong, implication from such legislation. The reasons for these views were fully expressed in those cases, and need not be repeated. We adhere to them without modification. But when a case comes before us from a state in which a different policy prevails, clearly shown by the local constitution or statutes, or by the settled decisions of the state courts, we are bound to decide it accordingly. We are not satisfied that this is such a case.

The sections of the Code of Tennessee already referred to, so far as we can perceive, confer only the ordinary powers generally given to county jurisdictions. No extraordinary powers are given; and no mode of raising funds for the erection or repair of public buildings is pointed out, except the levy of a special tax.

In the case of Wells v. Sup'rs, 102 U. S. 631, 26 L. Ed. 122, we held that the power to issue county bonds did not arise from a power to subscribe for stock in a railroad company, where authority was at the same time given to assess and collect a tax for the payment of the capital stock, and no other authority to raise the requisite funds was given.

Under the Code of Tennessee contracts may of course be made for the erection or repair of public buildings, and the power to issue vouchers for payment is necessarily implied, but no power is given to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities. No such power is expressly given, and in our judgment no such power is necessarily implied. The document sued on in this case may very well have served the purpose of a voucher to show a stated account as between Sturm and the county, and may be of such form as to be assignable by indorsement, but it must always be liable, in whosesoever

hands it may come, to be open for examination as to its validity, honesty, and correctness.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to award a new trial, and to take such further proceedings as may be in accordance with this opinion.

BROWN v. BON HOMME COUNTY.

(Supreme Court of South Dakota, 1890. 1 S. D. 216, 46 N. W. 173.)

CORSON, P. J.[8] This is an action (two cases consolidated) brought by the plaintiff against the county of Bon Homme, on a number of bonds and coupons alleged to have been issued by said county, bearing date the 1st day of July, A. D. 1878. * * *

On the back of each bond was printed a copy of the act, the title of which is given in the bonds, and the sections that are deemed material to an understanding of this case are as follows:

"Section 1. That the outstanding indebtedness of the county of Bon Homme, territory of Dakota, payable out of the taxes for ordinary county revenues, special bridge fund, and the sinking fund tax, shall be funded as hereinafter provided.

"Sec. 2. That the county commissioners of the aforesaid county, on the passage of this act, shall have the authority, and it is hereby made their duty, to provide that, whenever warrants drawn upon the fund hereinbefore mentioned shall be presented to the county treasurer of said county, in sums of fifty dollars and upwards, for the purpose of being funded, such warrants shall be taken up, the interest calculated thereon on the 1st day of July, 1878, and in lieu thereof, and in payment of said warrants, that the bonds of said county, in denominations of not less than fifty dollars, bearing date July 1, 1878, and with coupons for interest attached to said bonds, and payable as hereinafter mentioned, be issued to the holder of such warrants."

"Sec. 4. It shall be the duty of the county commissioners of said county to fund the outstanding indebtedness, as herein provided, to levy and collect annually a tax, in cash, sufficient to pay the interest on said bonds, and after five years they shall collect, in addition thereto, annually, a sinking fund bond tax, sufficient to pay the principal of such bonds by the time they shall become due and payable; and with such sinking fund bond tax, as fast as the same is collected, they shall go into the market and buy up such bonds, and retire the same, and such interest tax and sinking fund bond tax shall not be used for any other purpose: provided, that no more than the par value shall be paid for said bonds."

"Sec. 6. The county commissioners of said county shall, at the first session of the board after the passage of this act, make such provisions

[8] Part of the opinion is omitted.

as shall be necessary and proper for carrying out the provisions of this act, or as soon thereafter as it can reasonably be done; and such bonds shall be either printed or lithographed, with interest coupons thereto attached, and shall be executed by the chairman of the board of commissioners for the county aforesaid, and shall be under the seal of the county, and attested by the clerk thereof, and shall be payable to the order of the persons respectively presenting such warrants." * * *

The complaints are in the usual form, and the answers, which are substantially the same, are, in substance, as follows: After denying each and every allegation of the complaint not specifically admitted, they proceed to allege, as matter of defense, that the board of county commissioners of said Bon Homme county never made any provision for funding the indebtedness of said county, in pursuance of the provisions of the act under which said bonds and coupons purport to be issued, and that, until the said board had provided for carrying into effect the said act, there was no authority or power conferred upon the chairman and clerk of said board to issue the bonds of the said county, sued upon in this action; that said board never authorized the issue of said bonds, or empowered the chairman and clerk of said board to sign the same on behalf of the county; that the bonds in suit purporting to be signed by the chairman and clerk of said board are not the bonds and coupons of said county; that the same were issued without consideration, or the surrender of any warrants of the county authorized to be funded under the said act; that the said bonds and coupons are illegal and void, and that A. M. Young, who purports to have signed them as chairman, was not such chairman at the time the bonds purport to have been issued, and that the defendant is not indebted upon said bonds in any sum whatever. * * *

The first question, therefore, to be determined by the court is, are the bonds, so signed by the chairman Young and the county clerk, in July, 1877, but bearing date July 1, 1878, without authority to issue them being conferred by the board of county commissioners, valid bonds of Bon Homme county, and binding upon that county?

The first objection to the validity of these bonds is that they were signed and issued before the time they bear date, and that, at the time they bear date, A. M. Young, who signed them as chairman, was neither chairman nor member of the board of commissioners of Bon Homme county. The act under which these bonds were issued seems to contemplate the issuance of bonds to fund the outstanding warrants of the county in advance of the time they are to bear date. The second section provides "that the county commissioners of the aforesaid county, on the passage of this act, shall have the authority, and it is hereby made their duty, to provide that, whenever warrants drawn upon the fund hereinbefore mentioned shall be presented, * * * such warrant shall be taken up, the interest calculated thereon to the 1st day of July, 1878, * * *" and bonds issued therefor to the

holder of such warrants. And section 6 provides: "The county commissioners * * * shall, at the first session of the board after the passage of this act, make such provisions as shall be necessary and proper for carrying out the provisions of this act, or as soon thereafter as it can reasonably be done. * * *"

As the act was approved February 17, 1877, it is quite clear that the legislature intended to give the board power to proceed at once to fund these warrants, and that the date that they should bear was inserted in the act for the purpose of fixing a time up to which interest on the warrants should be calculated, and from which interest on the bonds should commence to run. At the time these bonds were signed and issued, A. M. Young was, as shown by the commissioners' record, the chairman of the board. We are of the opinion, therefore, that this objection should not be sustained. Chickaming v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307; Town of Weyauwega v. Ayling, 99 U. S. 112, 25 L. Ed. 470.

The second objection to the validity of these bonds is, that no action was ever taken by the commissioners in regard to the issuing of these bonds, and no provision was ever made by them for funding the outstanding warrants of the county, as provided in said act, and that the plaintiff should have shown that such action by the commissioners was had, providing for the funding of the outstanding warrants of Bon Homme county, and authorizing the issuance of these bonds, to entitle the plaintiff to recover in this action. A county must have legislative authority to issue bonds, before its officers can bind it to the payment of bonds purporting to be issued on its account. The public can act only through its authorized agents, and it is not bound until all who are required to participate in what is to be done have performed their respective duties. Anthony v. Jasper Co., 101 U. S. 693, 25 L. Ed. 1005; Bank v. Bergen Co., 115 U. S. 384, 6 Sup. Ct. 88, 29 L. Ed. 430.

The law under which the county of Bon Homme derived all its powers provided that the county commissioners should fund the outstanding indebtedness of Bon Homme county that should exist on the 1st day of July, 1878. The power of the board under the law was limited. It is not a case where there existed in the board a general power to issue negotiable securities of the county. It is a case where there was no power, except as specifically delegated by law for a particular purpose. All persons taking securities of public corporations having only special powers must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a bona fide holder, authority to issue them must appear. Bank v. Bergen Co., supra; Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040; Cagwin v. Town of Hancock, 84 N. Y. 532; Floyd, Acceptances, 7 Wall. 676, 19 L. Ed. 169. Every person purchasing such bonds is chargeable with notice of that which the law requires him to know, and he is chargeable with notice of what is contained on the

face of the bonds he is dealing in; and if, upon the face of the bonds, the law authorizing their issue is referred to, he is bound to take notice of the statute, and of all its requirements.

In this case not only was the title of the act under which the bonds were issued given on the face of the bond, but all the provisions of the act were printed on the bonds. It will be observed that the act under which these bonds purport to have been issued conferred upon the commissioners of Bon Homme county special authority to fund the outstanding indebtedness of that county that might be existing on the 1st day of July, 1878, but conferred no such authority upon the chairman and clerk of said commissioners. It was the county commissioners, and the commissioners only, that could make the necessary provisions required to be made by the act for funding this outstanding indebtedness, and until they made the necessary provisions, and authorized the issuance of bonds, no bonds legally binding upon the county could be issued. In other words, bonds not so issued were not the bonds of the county. The purchaser was consequently charged with the duty of ascertaining the fact that the commissioners had performed the duty imposed on them, and that authority to issue said bonds had been conferred upon the chairman and clerk of the board by the board of county commissioners of Bon Homme county. It was the duty of the purchaser of the bonds in suit to have ascertained by an examination of the records of that county whether or not the board of county commissioners of Bon Homme county had made the necessary provisions for funding the outstanding indebtedness of that county, and had authorized the issuance of these bonds by the chairman and clerk. Had he caused such an examination to be made, he would have been advised that no such provisions had been made, and that no authority had been given by the board for the issuance of these bonds, and that they were not, at the time they were issued, obligatory upon the county.

It was strenuously contended by the learned counsel for the respondent that no action of the board of county commissioners was necessary; that as the law made it the duty of the commissioners to fund the county indebtedness, the chairman and clerk could proceed to issue the bonds, as they did do, without authority from the board to act in the matter, and authorize their issuance. We cannot so hold. The issuing of these bonds involved the performance of important duties imposed upon the county commissioners, as the fiscal agents of the county, that could only be performed by them. As the act only authorized the commissioners to fund the outstanding indebtedness, it was their duty to ascertain what that outstanding indebtedness was, to provide for a proper examination of the warrants so to be funded, and determine the amount, denomination, and number of bonds to be issued, to require the treasurer of the county to note such facts on his bond register as they might deem necessary in order to fully protect the county, and to make, generally, such regulations in regard to

the issuing of said bonds as they might deem expedient, and finally to authorize the issuance of the bonds. Until these acts were done, the chairman and clerk were without authority to act. Any other rule would, in our opinion, be fraught with too much danger to public corporations. The doctrine now established making the acts and recitals of the duly-authorized agents of the county, acting within the scope of their authority, obligatory upon the corporation, is sufficiently onerous without adding to it a liability for acts and recitals of unauthorized agents. Bank v. Bergen Co., supra; Whiteside v. U. S., 93 U. S. 247, 23 L. Ed. 882; County of Daviess v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; Cagwin v. Town of Hancock, 84 N. Y. 532.

The learned counsel for respondent contends that the defendant is estopped from contesting the validity of these bonds by reason of the recitals therein contained. There are no recitals in these bonds of the existence of any facts that the chairman and clerk of the board were authorized to ascertain and determine. The effect of recitals made by a board, or by officers authorized to make them, is clearly stated by the court in Bank v. Bergen Co., supra: "There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a bona fide purchaser, without notice of any defect in the proceedings, the municipality has been held to be estopped from denying the truth of the recitals. The ground of the estoppel is that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination."

Counsel for respondent has cited several cases in which bonds have been issued by the chairman and clerk of towns and counties with recitals which the supreme court has held estopped the municipality, but it will be seen, we think, from an examination of them, that the principle upon which the cases were decided is that stated by Justice Field in the Bergen County Case, namely, that the statute imposed upon the officers who executed the bonds certain duties, such as ascertaining the result of an election or vote taken upon the issuance of the bonds, that could only be performed by such officers. * * * In Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579, also cited by counsel for respondent,—which was a case where the recovery was resisted by the town mainly upon the alleged ground of the want of power in the officers of the town to issue the bonds because the legal voters

of the town had not been notified to vote upon the subscription questioned,—the court says: "The duty of ascertaining [the result of the vote] was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk, and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that these officers, or one of them, at least, should determine whether the requirements of the act prior to subscription to the stock of the railroad company had been met."

These cases sufficiently illustrate the principle upon which this class of decisions is founded, and show clearly that the authority of such officers to sign and issue the bonds is derived from the act of the legislature, and the vote or election held thereunder, and not from any board having duties to perform in regard to the matter; and also show that the recitals made by such officers are held to conclusively bind the corporation, because the recitals are of facts it is made the duty of such officers to ascertain and determine "once for all." In the case at bar no duties of this kind were imposed upon the chairman and clerk of the board, or any duties other than the ordinary clerical duty of signing the bonds and coupons, when authorized so to do by the county commissioners; consequently there are no recitals in these bonds that they were authorized to make, as such officers, and the alleged recitals do not, therefore, conclude the county. These bonds, therefore, being issued by the chairman and clerk of the board, without being authorized to so issue them by the county commissioners, were not binding upon the county.

The plaintiff, not relying entirely upon the validity of the bonds in suit, introduced evidence tending to prove that the county, by the acts of its county commissioners, treasurer, and other officers, had ratified the act of the chairman and clerk of the board in issuing these bonds, and now contends the county is estopped from denying their validity. * * *

It seems to be the established doctrine of the courts, state as well as national, that municipalities may, not only by recitals in bonds, but by acts of ratification, be estopped from setting up irregularities in the issuance of bonds, when they have passed into the hands of bona fide holders for value, before maturity. Judge Dillon, in his work on Municipal Corporations, (4th Ed.) § 548, says: "As to irregularities in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or of the tax-payer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, has been held to estop the municipality from defending, on the ground of non-compliance

with conditions precedent, especially when the bonds, as is usually the case, have been negotiated for value. But the corporation is in no case estopped from setting up a total want of power to issue the bonds." Supervisors v. Schenck, 5 Wall. 782, 18 L. Ed. 556; County of Ray v. Vansycle, 96 U. S. 688, 24 L. Ed. 800; Pendleton County v. Amy, 13 Wall. 306, 20 L. Ed. 579; Burr v. City of Carbondale, 76 Ill. 455; Rogers v. Burlington, 3 Wall. 654, 18 L. Ed. 79; Bissell v. Jeffersonville, 24 How. 300, 16 L. Ed. 664; State v. Van Horne, 7 Ohio St. 331; Shoemaker v. Goshen Tp., 14 Ohio St. 587; Butler v. Dunham, 27 Ill. 477; Steines v. Franklin County, 48 Mo. 176, 8 Am. Rep. 87; Barrett v. County Court, 44 Mo. 201.

In this case the county commissioners were fully authorized by the act of the legislature to fund the indebtedness of the county, and issue the bonds of the county therefor, and hence it was within the powers of the board and the county to ratify the unauthorized act of its chairman and clerk in the issuance of the bonds in suit. That this has been done in this case is fully shown by the records introduced in evidence. A careful examination of this evidence shows that, at a meeting of the board of commissioners held in October, 1877, a few months after the bonds in suit were issued, an order was entered reciting that the treasurer had presented the warrants taken in exchange for bonds numbered from 1 to 33, inclusive, and, being found correct, the same were destroyed by burning in the presence of the board. This order was published in the official newspaper of the county the same month. At the same time an entry was shown in the account of Treasurer Wells, as follows: "By amount of warrants exhibited and examined by the board of county commissioners, and destroyed in presence of board, by burning, $14,900." In January, 1879, a report was made by a committee appointed by the board, in which, among the liabilities of the county, is the item of amount of bonds issued in 1878, $27,700, and at which meeting of the board John Stafford, the witness introduced on the part of the defendant, appears to have been present, and this report was accepted and approved by the board. At this same meeting the record shows that warrants taken in exchange for county bonds from number 34 to 61, inclusive, amounting to $12,800, were presented by the county treasurer, examined by the board and found correct, and destroyed by burning in presence of the board. A large number of entries from the records were given in evidence of the levying and collection of taxes for the years 1878, '79, '80, '81, and '82, sufficient, not only to pay the interest on the $5,500 1875 bonds, shown by the report of the committee to be outstanding, but also the interest on the 1878 bonds. It will be observed that it only required $550 to pay the annual interest on the 1875 bonds, yet the amount levied each year, for interest, varied from $2,499.12, in 1878, to $3,676.16, in 1881. The coupons cut from the bonds in suit, bearing date July 1, 1878, were regularly paid, semi-annually, up to January 10, A. D. 1882, making seven payments in

all, which payments were regularly allowed by the commissioners in their settlements with the county treasurer, and not until about July, 1882, does the legality of these bonds seem to have been in any manner questioned, by either the county commissioners or the county of Bon Homme.

The plaintiff proved on the trial that he purchased the bonds in suit —being a part of the July, 1877, issue—in 1880, and paid their full par value, and without notice of any irregularity in their issue, or of any defects in the same. Whatever exception the people of Bon Homme county might have taken to these bonds at the time they were issued, it is certain they took none, either as individuals or through their authorized agents, the county commissioners, until long after these bonds had passed into the hands of innocent purchasers for value. They stood by and permitted taxes to be levied to pay the interest, and from which the interest on the coupons for several years was promptly met, and paid without protest, remonstrance, or complaint. And now it is asked that the irregularity in the issuance of these bonds, in the acts of their own officers, which they might have avoided by prompt action, but which they so long acquiesced in and repeatedly ratified, may be set up to defeat the bonds in this suit on the part of an innocent purchaser for full value, and who has, or may have, relied upon the long acquiescence and repeated acts of ratification. The records of the county show that the warrants surrendered up for these bonds were destroyed in 1877, by the agents of the defendant.

To compel an innocent purchaser to now litigate with the county, after a lapse of more than 10 years, the validity of these warrants, when the warrants themselves are destroyed, and the facts relating to them have almost, if not entirely, passed from memory, would, it seems to us, be doing manifest injustice to the present holders of the bonds. So far as the records of the county show, the county has received full consideration for these bonds. Warrants, examined by defendant's own agents, the county commissioners, and found correct, for the full amount of the bonds, were surrendered up and destroyed. No offer was made to show that these warrants were not regularly and properly issued and valid obligations of the county, and, in the absence of anything in this record showing that the warrants were not legal and valid, it is our duty to assume they were so. The county cannot restore them to the holders of the bonds, nor can it in justice ask to be relieved from the payment of the bonds, while it retains the consideration for which they were issued. We think this is a strong and clear case for the application of the doctrine of estoppel. The claims of good faith and fair dealing are as obligatory upon corporations and communities as upon individuals. * * * Affirmed.

WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 695 835 9